# DOCKET

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No. 83-1842-CFY
Status: GRANTED

Title: Jonathan Garrett, Petitioner
v.
United States

Docketed:
May 11, 1984

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: DeMassa, Philip A.

Counsel for respondent: Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 11 1984 | G | Petition for writ of certiorari filed. |
| 2 | May 14 1984 | | Record filed. |
| 4 | Jun 11 1984 | | Order extending time to file response to petition unti July 13, 1984. |
| 6 | Jul 13 1984 | | Order further extending time to file response to petition until July 27, 1984. |
| 7 | Jul 23 1984 | | Brief of respondent United States in opposition filed. |
| 8 | Jul 25 1984 | | DISTRIBUTED. September 24, 1984 |
| 9 | Oct 1 1984 | | Petition GRANTED.<br>************************************************************ |
| 10 | Nov 15 1984 | | Brief of petitioner Jonathan Garrett filed. |
| 11 | Nov 15 1984 | | Joint appendix filed. |
| 12 | Nov 26 1984 | | Record requested. |
| 13 | Dec 4 1984 | | SET FOR ARGUMENT. Wednesday, January 16, 1985. (2nd case). |
| 14 | Dec 10 1984 | | CIRCULATED. |
| 15 | Dec 10 1984 | | Record filed. |
| 16 | Dec 10 1984 | | Certified copy of original record, including 2 sealed envelopes received. |
| 17 | Dec 20 1984 | | Application for leave to file respondent's brief on th merits in excess of the page limitation filed, and |
| 18 | Dec 20 1984 | | order granting same by Powell, J., on Dec. 20, 1984. T brief may not exceed 54 pages. |
| 19 | Dec 24 1984 | X | Brief of respondent United States filed. |
| 21 | Jan 9 1985 | X | Reply brief of petitioner Jonathan Garrett filed. |
| 22 | Jan 16 1985 | | ARGUED. |
| 23 | Jan 17 1985 | | Record filed. |

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# PETITION FOR WRIT OF CERTIORARI

① 83-1842

Office - Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS
CLERK

NO. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JONATHAN GARRETT,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

PHILIP A. DeMASSA
Attorney at Law
2150 First Avenue
San Diego, California 92101
Telephone: (619) 236-0897

Attorney for Petitioner

129 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether under the circumstances of this case evidence of importation of marijuana (21 U.S.C. Sections 956 and 960) is a lesser-included offense of a continuing criminal enterprise charge (21 U.S.C. Section 848), and the Double Jeopardy Clause bars prosecution and punishment of Petitioner of the continuing criminal enterprise charge when evidence of the importation of marijuana, which was previously used to convict Petitioner of importation of marijuana, is introduced to establish a predicate act of the continuing criminal enterprise charge?

2. Whether a continuing criminal enterprise charge is a substantive offense?

3. Whether the decision of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction and holding that 21 U.S.C. Section 848 is a conspiracy offense and substantive offenses under Title 21 are not lesser-included offenses under Section 841 is in conflict with the decision of at least four other Circuits - United States v. Middleton, 673 F.2d 31, 33 (1st Cir. 1982); United States v. Samuelson, 697 F.2d 255, 260 (8th Cir. 1983); United States v. Gomberg, 715 F.2d 843, 851 (3rd Cir. 1983); United States v. Jefferson, 714 F.2d 689, 703 (7th Cir. 1983)?

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NO. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JONATHAN GARRETT,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Jonathan Garrett, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered March 2, 1984.

## OPINION BELOW

The Eleventh Circuit Court of Appeals entered its published opinion on January 23, 1984, That opinion is not set out in the Appendix. The January 23rd opinion (10 copies) will be lodged with the Court at the time of filing this Petition. The Court of Appeals withdrew this Opinion on March 2, 1984, and filed a new Opinion on March 2nd. The second Opinion is set out as Appendix "A" hereto. The Court of Appeals denied Petitioner's timely Petition for Rehearing And Suggestion For En Banc Consideration on March 13, 1984, a copy of

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[1] Appendix References are to Appendices to this Petition. Trial Record References are to the volume (Roman numerals) or date of the hearing or page (Arabic numberals) of the Record in the District Court.

which is attached hereto as Appendix "B".

## JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The United States Court of Appeals had jurisdiction under Title 28 U.S.C. Sections 1291 and 1293(1).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be
a witness against himself, nor be
deprived of life, liberty, or
property, without due process of
law; nor shall private property be
taken for public use, without just
compensation."

The statutes involved are Importation of Marijuana, 21 U.S.C. Sections 952, 960(a)(1), and 960(b)(2), and Continuing Criminal Enterprise, 21 U.S.C. Section 848, the pertinent text being set out in Appendix "C".

## STATEMENT OF THE CASE

Petitioner was indicted in the Western District of Washington on March 17, 1981, the pertinent text being set forth in Appendix "D". Petitioner was named as an unindicted co-conspirator in Count I which charged a conspiracy from an unknown date through August 27, 1980 within the Western District of Washington "and elsewhere" to import 12,000 pounds of marijuana, in violation of 21 U.S.C. Sections 952 and 963 (App. D, at D1-6). Among other Counts, Petitioner was charged in Count III that on August 26, 1980, at Neah Bay in the Western District of Washington with importing, and aiding and abetting the importation of 12,000 pounds of marijuana, in violation of 21 U.S.C. Sections 952, 960(a)(1), and 960(b)(2), 18 U.S.C. Section 2. (App. D, at D 7-8).

Petitioner pleaded guilty to Count III on May 18, 1981. On August 20, 1981, Petitioner was sentenced to the custody of the Attorney General for five (5) years and a $15,000 fine.

On July 16, 1981, the Northern District of Florida Grand Jury charged

Petitioner in a 12 Count Indictment, the pertinent text relating to Petitioner set forth in Appendix E. Count 1 charged Petitioner with conspiracy to import multi-ton quantities of marihuana and marihuana "Thai sticks", in the Northern District of Florida and in "divers other districts" from January, 1976 to July 16, 1981. (App. E, at E 1-7)

The Florida indictment alleged that acts regarding the same Neah Bay, Washington marijuana off-loading operation was charged as one of the overt acts of the Count I conspiracy to import marijuana. Overt Act 34 of Count I of the Florida indictment charged that "(o)n or about October 25, 1979, Joe Knowles met with JONATHAN GARRET, DONALD McMICHAELS, Robert Gorman and others in Bellevue, Washington, and discussed plans to import a shipload of marihuana." (App. E at E-14-15)

Count II charged Petitioner with conspiracy to possess with intent to distribute marihuana from January, 1976 to July 16, 1981, in the Northern District of Florida and "divers other districts", in violation of 21 U.S.C. Sections 841, 846 (App. E, at E 15-16)

Count XI charged Petitioner from January, 1976 to July 16,1981 in the Northern District of Florida and "divers other districts" with engaging in a Continuing Criminal Enterprise by violating 21 U.S.C. Sections 841(a)(1), 843(b), 846, 952, and 963 which were part of a continuing series of violations in concert with at least 5 other persons while Petitioner acted as an organizer, supervisor, or manager, and from which Petitioner obtained substantial income in violation of 21 U.S.C.

Section 848. (App. E, at E-11).

Petitioner was convicted by jury trial of the above counts and was sentenced to the custody of the Attorney General for 5 years and $15,000 fine on Counts I and II, and 4 years and $15,000 fine on Count VII, all to be consecutive with each other, and as to Count XI custody of the Attorney General for 40 years and a $100,000 fine. Count XI was ordered to run concurrent with Counts I, II, and VII. All sentences were ordered to run consecutive to Petitioner's 5 year term imposed in Washington. Timely appeal followed. Petitioner remains in custody. The subject of this Petition, the Count XI conviction, was affirmed by the Court of Appeals on March 2, 1984.

## ARGUMENT

## I

## PETITIONER'S PROSECUTION FOR VIOLATION OF 21 U.S.C. SECTION 848 WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THAT EVIDENCE OF A PREVIOUSLY TRIED LESSER INCLUDED OFFENSE OF 848 WAS INTRODUCED IN THE 848 PROSECUTION.

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### A. Factual Background

The Continuing Criminal Enterprise charge (Count XI) did not specify which acts formed part of a continuing series of violations. Although Petitioner filed a pre-trial Bill of Particulars Motion specifically asking the government to specify which predicate acts the government relied upon to prove the continuing series of violations, the trial court denied the motion. Irrespective of the pleadings, the government introduced the same "Neah Bay" evidence in Florida against Petitioner on Count XI as used to convict him in

Washington.

Michael Johnston met Petitioner in August of 1980, at Neah Bay, Washington. The next evening, he observed a boat captained by Petitioner. Johnston next saw Petitioner on August 27, 1980, when he participated in the off-loading of marijuana from a boat, Petitioner being present. (R.T. Vol. VII 72-82).

Joseph Martin, the Neah Bay Police Chief, and David Wilma, a Washington State D.E.A. agent, testified for the government. (See generally R.T. VII, 101-121). Evidence of the seizure of approximately 12,000 pounds of marijuana "Thai sticks" was introduced by the government at Petitioner's trial (R.T. V, 128) which resulted in his conviction for 21 U.S.C. Section 848.

The Court of Appeals rejected Petitioner's argument, that since Section

848 is a substantive offense the introduction of Washington evidence in the Florida prosecution violated his guarantee against double jeopardy, relying on United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B 1981), cert. denied 457 U.S. 1136 (1982). However, four (4) other Circuits have rejected the Phillips analysis and held that Petitioner's analysis is correct, and the Section 848 prosecution should have been barred by the Double Jeopardy Clause.

B. The Breadth of the Double Jeopardy Clause.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb". Fifth Amendment, United States Constitution.

It has long been recognized that separate statutory crimes need not be identical--either in constitutional elements or in actual proof--in order to be the same within the meaning of the constitutional prohibition. 1 J. Bishop, New Criminal Law, Section 1051 (8th Ed. 1885); Comment, Twice in Jeopardy, 75 Yale LJ 262, 268-69 (1965).

Once the legislature has defined the crimes and fixed punishments, prosecutors and courts may not seek more than one punishment for the same offense or punishment in more than one trial. Brown v. Ohio, 432 U.S. 161, 165 (1977).

The government has improperly sought through the Florida 848 prosecution to again prosecute and punish Petitioner for his smuggling activities at Neah Bay, Washington.

## C. Title 21, United States Code, Section 848 Is A Substantive Offense.

Although a number of cases have

assumed for purposes of applying "lesser included offense" standards that 21 U.S.C. Section 848 may be closely akin to a "conspiracy" type of offense, it is clear that Section 848 is in reality a substantive offense requiring proof of five (5) elements: 1) a felony violation of the federal narcotics law; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant is an organizer or supervisor; (5) from which he derives substantial income or resources.

The essence of the offense of "conspiracy" is the agreement to commit unlawful acts. See Iannelli v. United States, 420 U.S. 770, 777 (1975). Thus, a conspiracy violation of Title 21 U.S.C. Sections 846 and 963 do not even require proof of an overt act. Rather, the crime of conspiring to violate the Controlled Substances Act is complete once there is sufficient proof that the conspiracy described in the indictment was willfully formed, was existing at or about the time alleged, and that the defendant willfully became a member of the conspiracy. See generally, *United States v. Thomas*, 567 F.2d 638, 641 (5th Cir. 1978), reh. denied 569 F.2d 1155.

To convict a defendant under 21 U.S.C. Section 848, specific substantive elements are required. Thus, concerted action even by one in a position of management or as an organizer is insufficient. The statue *also* requires that the *actual conduct* amounting to a "continuing series of violatons" occur, as well as those violations actually result in the defendant deriving substantial income or resources from the continuing series of violations.

## D. The Prosecution of Appellant for Violation of 21 U.S.C. Section 848 Following His Conviction for Importation of Marijuana is Barred

The Double Jeopardy Clause applies to prosecutions for the same offense following conviction, as well as protecting against multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (Footnotes omitted).

The guarantee embodied in the Double Jeopardy Clause also protects against attempts to secure additional punishment after a prior conviction and sentence. Green v. United States, 355 U.S. 184, 187-88 (1957).

Traditionally, the "same evidence" test has been applied to determine whether a double jeopardy violation exists. Thus, if each offense requires proof of a fact that the other does not, the Blockburger[2] test is satisfied.

However, due to the overly restrictive nature of the "same evidence" test, successive prosecution may be barred even where differing factual elements must be proven in successive prosecutions. "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." Brown v. Ohio, supra, at 166, n. 6.

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[2] The "Blockburger" test is: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not...." Blockburger v. United States, 284 U.S. 299, 304 (1932).

the other does not, the Blockburger[2] test is satisfied.

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Thus, prosecutors are forbidden to strive for cumulative punishment, whether it be achieved through the prosecution for two crimes at the end of a single prosecution, or whether it be achieved through successive prosecutions. Id.

Brown recognized that all of the elements of a crime need not necessarily be exactly the same elements of the lesser offense: "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Id. at 168.

In Petitioner's case, importation of marijuana is a lesser included offense of a continuing criminal enterprise in that the latter offense requires the commission of a federal narcotics felony, which importation of marijuana clearly is.

In In Re Nielsen, 131 U.S. 176

(1889) a Mormon was convicted of cohabiting with his two wives over a 2 1/2 year period. He was subsequently charged with the different crime of adultery, based on his cohabitation with one of the wives the day (May 14, 1888) following the date (May 13, 1888) cited in the indictment. The Double Jeopardy Clause forbade such subsequent charge:

> "where...a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." 131 U.S. at 188.

Here, the government retried Petitioner in Florida for his smuggling activities at Neah Bay following his conviction for that crime in Washington.

The fact that "one of those incidents" was tried prior to the greater offense, i.e. the continuing criminal enterprise prosecution, makes no substantive difference in evaluating the Double Jeopardy claim. Both methods of prosecution are equally violative of the Double Jeopardy Clause.

A clearer example of the improper prosecutorial conduct in this case is State v. Cooper, 13 N.J.L. 361 (1833), where a subsequent felony-murder prosecution was barred by the previous related arson prosecution on Double Jeopardy principles: once the offense was prosecuted in its milder form, it "is better that the residue...go unpunished." Id. at 376.

The government sought to prosecute Petitioner for his criminal activity in a 'milder' form in Washington. The residue of Petitioner's unlawful conduct must not be permitted to justify additional prosecution and punishment of Petitioner no matter how facially warranted it may seem. For such conduct clearly violates the protections of the Double Jeopardy Clause.

The above analysis has implicitly been accepted by at least four (4) Circuits which have considered the question and reject the Phillips analysis. In United States v. Middleton, 673 F.2d 31 (1st Cir. 1982), the defendant had been indicted in Florida on six (6) counts charging a marijuana smuggling operation, including Section 848. Approximately one year later, Middleton was indicted in Maine for conspiracy to possess marijuana with intent to distribute. One month later, the Florida grand jury returned a superceding indictment, extending the period of the continuing criminal enterprise violation. At Middleton's Florida trial the continuing criminal enterprise charge was dismissed.

Subsequently, the Maine district court, dismissed the conspiracy to possess with intent to distribute marijuana charge, the government conceding that jeopardy had attached due to the Florida acquittal on the 848 charge. Finding that jeopardy attached, the district court dismissed the substantive charge of possession with intent to distribute marijuana because the government had not limited the use and purpose of the Maine evidence introduced at the Florida trial to proving the conspiracy to possess with intent to distribute: "an offense actually relied upon to establish a continuing criminal enterprise under Section 848 thus is a lesser-induced offense under that section." Id. at 33

Inasmuch as the government failed in this case to specify (in spite of Petitioner's attempt to acquire this information through a bill of particulars) whether they were introducing the evidence of the Washington importation to prove (1) the conspiracy charged in the indictment, or (2) the continuing criminal enterprise charge, the Section 848 conviction should have been barred.

*United States v. Samuelson*, 697 F.2d 255 260 (8th Cir. 1983), is in accord and conflicts with *Phillips*.

The Third and Seventh Circuits have held that a defendant convicted of an 848 violation could not also be sentenced on conspiracy and substantive predicate offenses proved at trial to sustain the 848 charge. *United States v. Gomberg*, 715 F.2d 843 (3rd Cir. 1983), *United States v. Jefferson*, 714 F.2d 689 (7thCir. 1983).*Middleton*, *Samuelson*, Gomberg, and Jefferson compel the conclusion that just as cumulative sentencing cannot be imposed, cumulative prosecutions based on the same factual settings cannot be prosecuted to later obtain the aforementioned cumulative punishment.

## E. Jeffers v. United States Does Not Hold 21 U.S.C. Section 848 To Be A Conspiracy Offense.

The government erroneously argued below that Jeffers v. United States, 432 U.S. 137 (1977) held that 21 U.S.C. Section 848 is essentially a conspiracy statute.

Jeffers is a plurality opinion. The fifth vote did not support the analysis of the plurality opinion, only concurring in the judgment because Iannelli v. United States, infra, controlled.

The Jeffers plurality rejected the government's argument that an "agreement" is not an essential element of Section 848, arguing that five innocent dupes each acting separately but "in concert with" the ringleader of the continuing criminal enterprise, would meet the requirements of the statute. Id. at 147. The plurality assumed "for this case" a conviction would be impossible unless concerted activity and an agreement were present. Id. at 148-150.

At no point does the Jeffers plurality hold Section 848 to be a conspiracy offense. If, as in the case with Section 848, other substantive elements are required to prove the statutory offense, then it must be concluded that the offense is a substantive one, which simply requires concerted action as one element of that offense.

The reason Section 848 is unlike a typical conspiracy statute is because it is in reality not a conspiracy offense, but a substantive one. And, unlike a typical conspiracy statute which proscribes an inchoate offense, the essence of which is an agreement to commit an unlawful act, a Section 848 violation requires the commission of federal narcotic violations as well as the derivation of substantial income and a managerial role.

### F. One Can Aid And Abet The Substantive Offense Of Section 848 And Not Be A Conspirator.

Another explanation of the substantive nature of Section 848 lies in Phillips' reference to the fact that an aiding and abetting offense is different from a conspiracy offense and requires a different form of intent. Specifically, the "community of intent" in an aiding and abetting offense is not the same as a conspiratorial agreement, and proof of aiding and abetting does not require proof of an agreement. 664 F.2d at 1010.

There must be more than one person acting in concert to establish a conspiracy. E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, Section 27.12 (3d Ed. 1977).

Conspiracy is a specific intent crime. E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, Section 27.05 (3d Ed. 1977). To adopt the reasoning that Section 848 is a conspiracy statute, it must first be accepted as a matter of law that the five or more person whom the 848 defendant organizes/supervises/manages must share the same specific intent as the 848 defendant to conspire to violate Section 848, not merely the specific intent to violate the drug laws. To hold otherwise would impermissibly change a specific intent statute into a general intent one. United States v. Melchor-Lopez, 627 F.2d 886, 892

(9th Cir. 1980).

An 848 defendant cannot be held to have agreed with those he manages, etc. to commit the conspiracy of a continuing criminal enterprise offense since there need not be any showing that the five persons specifically agreed to commit that offense. If the evidence indicated such an agreement, the five "underlings" would be considered organizers, etc. themselves and also guilty of the 848.

The same logic does not apply if the five (or more) underlings are considered aiders and abettors to the 848 defendant. An aider and abetter need not have to be shown to be in a conspiracy agreement. *Pereira v. United States*, 437 U.S. 1, 11 (1954).

It is true that an aider and abettor can be punished as a principal. However, one who aids and abets a person engaged in more than one violation of the law as a continuing series of violations is not guilty of aiding and abetting in that continuing series of violations. United States v. Tarr, 589 F.2d 55, 60 (1st Cir. 1978).

In the same manner, one of the five underlings can be guilty of committing single, substantive offenses with the organizer, supervisor, etc., without the underling being convicted as an aider and abettor to a Section 848 offense.

Additionally, the structure of drug offenses set forth in Title 21 Sections 801, et seq. and 901, et seq. has a separate and distinct section for conspiracy: Sections 846 and 963. It is possible that one can agree with an 848 defendant to commit the offense of 848 and be guilty of the conspiracy (846 or 963) and not the 848 violation. If 848 were a true conspiracy statute, one could not conspire to commit Section 848 because it is legally impossible to conspire to commit a conspiracy. There cannot be a conspiracy to commit an inchoate crime.

Further, if 848 is a conspiracy statute, one who merely agreed to assist an 848 defendant in the commission of Section 848 could not be guilty of Section 848 because he does not commit all the requisite elements of Section 848. Therefore, accepting 848 as a conspiracy statue, those who agree to commit the 848 crime, help the 848 defendant but do not either manage, etc. and obtain substantial income or resources and can be convicted of nothing.

The reprosecution of appellant Garrett for the act of importing marijuana into Neah Bay, Washington, in the instant case violated the double jeopardy clause, and mandates the reversal of appellant's conviction for having violated 21 U.S.C. Section 848.

## CONCLUSION

For the reasons set forth above, the Petition should be granted and a Writ of Certiorari should issue to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Philip A. DeMassa
Philip A. DeMassa, A Professional Corporation
2150 Fourth Avenue
San Diego, CA 92101
Telephone (619) 236-0897
Counsel of Record for Petitioner

## CERTIFICATE OF MAILING

I hereby certify that I am a member of the bar of this Court and that on May 11, 1984, three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed via airmail, postage fully prepaid, return receipt requested, to: The Solicitor General, Department of Justice, Washington, D.C. 20530.

The above listed parties are all of the parties required to be served.

Philip A. DeMassa, Esq.

# APPENDICES

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, ) Filed: March 2, 1984
)
Plaintiff-Appellee, ) No. 81-6205
)
v. )
JONATHAN GARRETT and )
CHRISTOPHER GARRETT, )
)
Defendants-Appellants )

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FLORIDA

(Hon. Lyn C. Higby, U.S. District Judge)

Mervyn Hamburg, Assistant United States Attorney, United States Department of Justice, Washington, D.C. for Plaintiff-Appellee.

Philip A. DeMassa, San Diego, California, for Defendant-Appellant Jonathan Garrett. Roy E. Black, Miami, Florida, for Defendant-Appellant Christopher Garrett.

FAY and KRAVITCH, Circuit Judges, and

ATKINS,* District Judge.

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

KRAVITCH, Circuit Judge:

For the purpose of clarification, the panel vacates its opinion in United States v. Jonathan Garrett and Christopher Garrett, No. 81-6205, slip. op. at 1352 (11th Cir. Jan. 23, 1984), and substitutes the following in its stead:

Appellants, Jonathan Garrett and Christopher Garrett, were convicted of violating the federal narcotics laws in connection with a large drug importation and distribution scheme. They were sentenced to prison terms and fined. In addition, the district court entered an order forfeiting Jonathan Garrett's yacht. In this appeal, Jonathan Garrett asserts (1) that the district court's disqualification of retained counsel violated his right to the counsel of his choice; (2) that his prosecution for engaging in a continuing criminal enterprise was barred by the double jeopardy clause; (3) that the court erred in denying his motion for a bill of particulars; (4) that the court's restricting the cross-examination of a government witness violated his right of confrontation; and (5) that his right to a jury trial on the forefeiture issue was not properly waived. Christopher Garrett argues (1) that the admission of a non-testifying codefendant's confessions deprived him of his right of confrontation and (2) that his joint trial with a defendant against whom the bulk of the evidence was offered did not satisfy the constitutional requirement of a fair trial. We remand for further proceedings with respect to the forfeiture order and affirm in all other respects.

I. BACKGROUND

Between 1976 and 1981, Jonathan Garrett and his brother, Christopher, were involved in an extensive marijuana importation and distribution operation. Directed primarily by Jonathan, this scheme entailed off-loading, transport and storage, as well as meetings and telephone calls, in several states, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas and Washington.

In March, 1981, Jonathan Garrett was charged in Washington with importing marijuana, aiding and abetting the possession of marijuana with intent to distribute, and traveling in interstate commerce for the purpose of facilitating the importation of marijuana. He pled guilty to the importation charge and was senteneced to five years imprisonment and fined $15,000. In July 1981, appellants and four others were indicted in Florida for violating the Travel Act, 18 U.S.C. Section 1952, and various sections of the Controlled Substances Act, 21 U.S.C. Section 801 _et seq_.

When Jonathan Garrett was arraigned in August 1981, the government moved the district court to disqualify the attorney whom he had hired, one Marger, stating that the attorney was a target of the investigation and had been identified as a participant in the scheme, and suggesting that he was a potential defendant and a potential witness. Marger denied any impropriety, attempted to explain why the allegations were false and requested a hearing. The court nevertheless granted the government's motion. Having appointed another attorney to represent Garrett, the court denied subsequent motions to allow Marger to serve as counsel.

In September 1981, Jonathan Garrett filed a motion to dismiss on double jeopardy grounds, asserting that his conviction in Washington on a marijuana importation charge barred prosecution on a continuing criminal enterprise charge which encompassed, inter alia, the Washington importation operation. He also filed a motion for a bill of particulars, requesting that the government provide the details of each incident relied upon to establish a "continuing series of violations" in connection with the continuing criminal enterprise charge. Both motions were denied as was Christopher Garrett's motion for severance. Appellants and their codefendants were tried jointly by a jury.

Jonathan Garrett was convicted of conspiracy to import marijuana (21 U.S.C. Sections 952, 960, 963) (Count I), conspiracy to possess marijuana with intent to distribute (21 U.S.C. Sections 841, 846) (Count II), use of telephone to facilitate illicit drug activity (21 U.S.C. Sections 963, 846, 843(b)) (Count VII), and engaging in a continuing criminal enterprise (21 U.S.C. Section 848) (Count XI); he was acquitted on another telephone misuse charge (Count VIII). Christopher Garrett was convicted of conspiracy to possess with intent to distribute (Count II), but was acquitted on the conspiracy to import charge (Count I) and on a telephone misuse charge (Count VI). On Counts I, II, and VII, Jonathan was sentenced to consecutive prison terms totaling fourteen years and was fined $45,000. With regard to Count XI, he was sentenced to forty years imprisonment, to run concurrently with the other prison terms and was fined $100,000. Christopher was sentenced to five years imprisonment and was fined $15,000.

Finally, the district court ordered that Jonathan Garrett's interest in a yacht, the Sun Chaser III, be forfeited. Count XI of the indictment, charging Garrett with engaging in a continuing criminal enterprise, had alleged that as a result of such activity, he had derived substantial resources subject to forfeiture, including the Sun Chaser III. During a conference conducted in chambers by the court with counsel, Garrett's attorney had stated that he had no objection to the forfeiture issue being resolved by the judge after the jury returned a verdict on the issue of guilt and innocence. After trial, the court determined that forfeiture was warranted notwithstanding evidence indicating that others also had an interest in the vessel.

### II. JONATHAN GARRETT' CLAIMS

#### A. Disqualification of Counsel

Jonathan Garrett asserts that the disqualification of Marger, whom he had retained as counsel, violated his Sixth amendment right to counsel. Specifically, he claims that he had an absolute right to the counsel of his choice irrespective of any potential infirmities[1]. This case, however, falls squarely within our decision in United States vs. Hobson, 672, F.2d 825 (11th Cir.), cert. denied, --- U.S. ---, 103 S. Ct. 208, 74 L.Ed.2d 166 (1982), in which we state: "(t)he right to counsel of choice is not absolute...and must give way where its vindication would create a serious risk of undermining public confidence in the intergrity of our legal system." Id. at 828. In Hobson, the defendant was charged with violating the federal narcotics laws. Relying upon the affidavits of two witnesses implicating one of the defendant's attorneys in the criminal operation, the district court entered a disqualification order. In so doing, the court concluded that evidence of the attorney's involvement might be offered and, if so, would possibly create the appearance of impropriety on the attorney's part and would bring before the jury an issue of the attorney's credibility which would operate to the defendant's detriment. On appeal, the court applied the two-pronged test for disqualification of an attorney under Canon 9 of Florida's Code of Professional Responsibility:

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[1] At the trial level, Garrett objected to the disqualification, but did not specifically argue that the right to counsel of choice is absolute. In response to the government's motion for disqualification, Marger denied involvement in the drug scheme and sought to explain the allegations against him. And in moving to allow Marger to represent Garrett, appointed counsel attempted to prove that the potential problem of Marger's being called as a defense witness would be obviated by the stipulation of all defense counsel. Garrett argues for the first time on appeal that he had the right to choose Marger as his counsel regardless of the accusations against him and his potential status as a defendant or witness.

First, although there need not be

> proof of actual wrongdoing, "there must be at least a reasonable possiblity that some specifically identifiable impropriety did in fact occur." Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case." "Under Canon 9, an attorney should be disqualified only when both of these standards have been satisifed."

*Id.* (citations omitted) (quoting *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir.1976)). Concluding that the district court's findings of fact were not clearly erroneous and that the court properly applied the relevant ethical standards, the court affirmed the order disqualifying retained counsel.[2]

In this case, the two-pronged test was also satisfied. First, the prosecutor informed the district court that the government expected to show "positive potential testimony against Mr. Marger," and testimony at trial described "specifically identifiable impropriety" on Marger's part and established a "reasonable possibility" that the impropriety occurred. In particular, Norman Vick, a participant in the drug operation, testified that Marger recovered Garrett's purchase money after an aborted attempt to buy a 70-foot shrimp trawler for smuggling purposes. Vick and another participant in the drug operation, Joel Knowles, testified that Marger was involved in an aborted effort to steal a 160-foot oil field supply boat again for smuggling purposes. Knowles also testified that he used Marger's office to contact Garrett in connection with the operation. Although these allegations may be false, this evidence no doubt would have raised the possibility of misconduct in the jurors' minds.

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[2] Although the opinion in *Hobson* was not unanimous, *see* *Hobson*, 672 F.2d at 829 (Kravitch, Circuit Judge, concurring in part and dissenting in part), we are, of course, bound by this precedent.

With respect to the second prong of the test, we conclude tht the likelihood of public suspicion outweighed the social interests in Marger's continued representation of Garrett. Although Marger's familiarity with Garrett's situation was valuable, he was not irreplaceable. Moreover, the testimony of Vick and Knowles portrayed Garrett's attorney as having engaged in unlawful activities and thus would have undermined his credibility before the jury. Because this testimony was not inherently or facially incredible Marger's continued representation of Garrett probably would have resulted in the erosion of public confidence in the integrity of the bar and of the legal system. We therefore hold that the district court's disqualification of retained counsel did not violate Garrett's rights under the Sixth Amendment.

Our closing remarks in Hobson are equally appropriate in this case:

> We are aware that (the defendant) has indicated that he would be willing to waive any ethical

> problems in order to have the benefit of his attorney's continued representation in this case. The defendant is not free to waive the problem presented here, however, because the (alleged) ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of (the defendant).

Hobson, 672 F.2d at 829.

While we hold that Garrett's rights were not violated, we are disturbed by the district court's failure to conduct a hearing or require affidavits confirming that accusations against Garrett's attorney would likely be elicited at trial, or that the attorney was a probable defendant or witness.

Such steps would have made it clear in advance of the disqualification at trial that there was a resonable possibility that impropriety did occur and that the likelihood of public suspicion outweighed the social interests in continued representation. Accordingly, this procedure would remove what might be viewed as prosecutorial discretion from the disqualification determination, would eliminate the incentive for the government to offer evidence at trial against a non-defendant attorney, and would avoid reversal on appeal on Sixth Amendment grounds where the evidence at trial fails to support the disqualification. That notwithstanding, we uphold the disqualification in this case since the evidence adduced at trial plainly satisfied the two-prong test.[3]

## B. Double Jeopardy

Invoking the Double Jeopardy Clause, Garrett contends that his conviction in Washington for importing marijuana barred the subsequent prosecution in Florida for engaging in a continuing criminal enterprise in violation of 21 U.S.C. Section 848.

Relying on the former Fifth Circuit's L.Ed.2d 166 (1982), we hold that Garrett's decision in United States v. Phillips 664 F.2d 971 (5th Cir. Unit B 1981), cert. denied 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354, ___U.S.___, 103 S.Ct. 208, 74 prosecution in Florida under section 848 after his conviction in Washington for importation did not violate the guarantee against double jeopardy.

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[3] Before the trial court and on appeal, Marger and Garrett have intimated that Marger was entitled to a hearing prior to disqualification. Insofar as Marger is not a party to this appeal and there is no indication that Garrett has standing to assert Marger's rights, we decline to address the issue.

The appellant in Phillips claimed that his conviction for aiding and abetting the importation of marijuana precluded a later prosecution for engaging in a continuing criminal enterprise encompassing teh same activity. Citing United States v. Ruigomez, 576 F.2d 1149 (5th Cir.1978), he argued that the aiding and abetting offense was a transaction within a larger unified conspiracy, the continuing criminal enterprise, and that the government was barred from proceeding with multiple prosecutions, even for substantive offenses, if there was a unified conspiracy. Noting that Ruigomez merely prohibits the government from carving up a single conspiracy into multiple conspiracy prosecutions, the court stated:

> (The defendant) asserts that in the situation in which a defendant is charged under section 848, the perpetration of constituent substantive offenses is 'part and parcel' of the large conspiracy-type offense. Indeed, this is true, Underlying violations are the very matters that trigger the applicability of section 848. Jeffers v. United States, supra, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168, does not support (the defendant's) claim that a prior substantive narcotics charge which is committed in the operation of a

continuing criminal enterprise precludes a later Section 848 prosecution. _Jeffers_ indicates that a prosecution for conspiracy to distribute narcotics in violation of 21 U.S.C. Section 846 is a lesser included offense of Section 848 because Section 848 requires proof of an agreement among the persons participating in the continuing criminal enterprise and thus requires proof of every fact necessary to show a violation under section 848 as well as proof of several additional elements. _Jeffers_ does not stand for the proposition that a prior prosecution for a _substantive_ offense bars a later continuing criminal enterprise prosecution under Section 848.

664 F.2d at 1009 (emphasis in original).

Although the Phillips court focused largely on the concept of a unified conspiracy, the case is most fairly read as holding that a substantive predicate offense under Title 21 does not constitute a lesser-included offense of Section 848 and thus double jeopardy does not attach to the underlying offense as as to bar a subsequent section 848 prosecution. In rejecting the appellant's claim, the court essentially held that the substantive constituent offense and the continuing criminal enterprise, even if parts of a single large conspiracy, were distinct for double jeopardy purposes.[4]

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[4] It is arguable that *Phillips* *could* have been decided on the ground that because the jury found several other offenses which could have been used as predicates for the section 848 conviction, the aiding and abetting offense was not *necessarily* used as a predicate offense and therefore could not be regarded as a lesser-included offense of section 848. After reexamining the opinion, however, we conclude that *Phillips* was not in fact decided on this more narrow ground. There is certainly no language in the opinion clearly stating that a conviction for a substantive offense takes on double jeopardy implications when used to establish the continuing criminal enterprise in a subsequent section 848 prosecution. Moreover, even if the *Phillips* court did adopt this alternative holding, our disposition of Garrett's double jeopardy claim would be the same. To the extent that Garrett was convicted of three Title 21 violations which could have served as constituent offenses, the government did not necessarily rely on the Washington importation and thus Garrett's conviction and sentence under section 848 should not be disturbed. In any event, we express no opinion on the correctness of this approach.

Because the present case is indistinguishable from Phillips, we conclude that Garrett's successive conviction for marijuana importation and prosecution under section 848 comported with the requirements of the Double Jeopardy Clause. See also United States v. Smith, 690 F.2d 748, 750 (9th Cir.1982), cert. denied, __U.S.__, 103 S.Ct. 1435, 75 L.Ed.2d 793 (1983) (reversing conspiracy conviction as lesser-included offense of section 848, but affirming without discussion conviction on substantive counts); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir.1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979) (same); cf. United States v. Barnes, 604 F.2d 121, 155-56 (2nd Cir.1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980) (affirming additional sentence for substantive violations imposed on defendant given maximum sentence for section 848 conviction).[5]

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[5] We realize that there is not unanimity among the circuits on this issue. See United States v. Samuelson, 697 F.2d 255, 260 (8th Cir.1983) (because substantive offenses actually relied on in establishing a continuing criminal enterprise may be considered lesser-included offenses of section 848, double jeopardy bars conviction and sentence on both substantive and continuing criminal enterprises charges); United States v. Middleton, 673 F.2d 31,33 (1st Cir.1982)(same); cf. United States v. Gomberg, 715 F.2d 843, 851 (3d Cir.1983) (double jeopardy bars cumulative sentences for substantive predicate offense and continuing criminal enterprise); United States v. Jefferson, 714 F.2d 689, 703 (7th Cir.1983) (same). Because we are bound by the Phillips decision, see Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir.1982), however, we have not independently compared the elements of the offenses, see Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct.180, 182, 76 L.Ed.306 (1932), or inquired into legislative intent, see Missouri v Hunter, __U.S.___, 103 S.Ct. 673, 74 L.Ed.2d 535, 542 (1983); Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981).

## C. Denial of Bill of Particulars

Garrett argues that the district court erred in denying the motion for a bill of particulars in which he requested the government to "(s)tate specifically what violations are referred to, and their dates and participants, for each incident relied upon to prove 'a continuing series of violations'" with respect to Count XI. In its response to Garrett's motion, the government asserted that "(t)he indictment in this case is a thorough and complete statement of the charges against Defendant," and that together with other government submissions, the indictment "sufficiently apprises the Defendant of the charges against him to allow him to prepare his defense...." On appeal, the government points out that the discovery documents produced at trial provided Garrett with adequate notice of the incidents relied upon to prove the continuing criminal enterprise charge and that Garrett was at no time unable to cross-examine a government witness because of unfamiliarity with the circumstances elicited on direct examination.

The standard of review with respect to a motion for a bill of particulars was articulated in United States v. Colson, 662 F.2d 1389 (11th Cir. 1981). There this court stated:

> The purpose of a bill of particulars is to inform the defendant of the charge in sufficient detail to enable adequate defense preparation and to minimize surprise at trial. Grant or denial of such a motion lies within the sound discretion of

> the trial court and may be challenged only for abuse of that discretion. Proof of abuse requires a showing of actual surprise at trial and prejudice to the defendant's substantial rights by the denial.

Id. at 1391 (citations omitted). We note that Garrett offers only the general assertion that he was not given adequate notice of the predicate offenses and that he fails to specify any evidence adduced by the government with which he was not already acquainted. Insofar as Garrett makes no "showing of actual surprise at trial and prejudice," we find no abuse of discretion in the denial of Garrett's motion for a bill of particulars.

D. Restriction of Cross-Examination.

Garrett claims that in restricting defense counsel's cross-examination of Thomas Ruth, a participant in the drug operation, the district court deprived him of his Sixth Amendment right to confront the witnesses against him. After testifying for the government, Ruth was subjected to extensive cross-examination by defense lawyers. He testified that he had been arrested while trying to sell marijuana in an unrelated incident; that he had been told by law enforcement officers that he might receive a prison term of at least five years; that upon receipt of immunity from prosecution, he had cooperated by detailing his participation in drug smuggling activities; that he had subsequently received funds from the government; and that he had testified for the government in an unrelated case. He also stated on cross-examination that he had once overseen an off-loading operation. At that point, defense counsel sought to ask whether Ruth had been advised by the government that because of his supervisory role, he could be charged with engaging in a continuing criminal enterprise.

At the bench conference following the government's objection, defense counsel said that he intended to show that Ruth's motive for cooperating with the government was to avoid being sentenced to a minimum of ten years and a maximum of life under section 848. Counsel for the government responded that the jury should not be made aware of the range of sentences which could be imposed if the defendant were convicted. In open court, the district judge asked Ruth, "(h)as anybody with the government ever advised you of the possibility or that you could be indicted for what is known as a continuing criminal enterprise?" Ruth replied, "(n)o, sir." As the cross-examination continued, Ruth related that he had never discussed with his attonrey the types of federal crimes for which he could have been prosecuted absent the grant of immunity and that he had not been advised of the possibility of the government's securing forfeiture of his property.

In United States v. Tolliver, 665 F.2d 1005 (11th Cir.), cert. denied, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982) this court stated:

> The extent of cross-examination with respect to an appropriate subject of

> inquiry is generally within the sound discretion of the trial court, and the trial court's decision will not be disturbed on review unless an abuse of discretion is present. There is, however, a sphere which a trial judge may not impinge, for the "discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment."

Id. at 1008 (citations omitted); see also United States v. Sonntag, 684 F.2d 781, 788 (11th Cir.1981) ("as long as the limitation (of cross-examination) does not interfere with the defendant's right of confrontation, this ruling is also discretionary with the trial court."); United States v. Varella, 692, F.2d 1352, 1355 (11th Cir. 1982); cert. denied, ___U.S.___ 103, S.Ct. 3542, 77 L.Ed. 2d 1392 (1983) (right to confront "is not unlimited, and the extent of cross-examination is committed to the sound discretion of the trial court"). We recognize that where a prosecution witness has been threatened with a criminal charge or actually charged with a criminal offense, the defendant is entitled to explore those circumstances on cross-examination in order to bring to the jury's attention the witness' possible motive or self-interest with respect to the testimony given. See Greene v. Wainwright, 634 F.2d 272, 274 (5th Cir. 1981). In this case, however, we conclude that the district court's limited interference with the cross-examination of

Ruth constituted neither an infringement of Garrett's confrontation rights nor an abuse of the court's discretion.

The scope of the cross-examination allowed with respect to Ruth was quite broad. Defense lawyers were permitted to inquire into the circumstances of his arrest, the fact that he struck a deal with the government whereby he would cooperate in exchange for immunity from a crime carrying a five-year minimum prison term, his status as a paid government witness, and the extent of his understanding of the various crimes with which he could have been charged. Indeed, the trial judge ruled out but a single line of questioning, and did so only after ascertaining that the witness had no knowledge of the subject. Both the judge's colloquy with the witness and defense counsel's subsequent cross-examination confirm that there was no basis in fact for the proposed line of questioning. Although the judge's questioning could have been more thorough, the record supports his implicit finding that further interrogation regarding a possible continuing criminal enterprise charge would not have exposed a source of bias on the witness' part. We therefore conclude that Garrett was afforded sufficient cross-examination to satisfy the Sixth Amendment.

We note also that pursuit of the proposed line of questioning would have revealed to the jury the severity of the sentence to which Garrett, if convicted, would have been subjected. Because such information would have been extrinsic and prejudicial, the trial court was certainly counsel's subsequent cross-examination confirms that there was no basis in fact for the proposed line of questioning. Although the judge's conclusion could have been more thorough, the record supports his implicit finding that further interrogation regarding a possible continuing criminal enterprise charge would not have exposed a source of bias on the witness' part. We therefore conclude that Garrett was afforded sufficient cross-examination to satisfy the Sixth Amendment.

We note also that pursuit of the proposed line of questioning would have revealed to the jury the severity of the sentence to which Garrett, if convicted, would have been subjected. Because such information would have been extraneous and prejudicial, the trial court was certainly

justified in preventing defense counsel from eliciting it. Hence we conclude that the court acted well within the exercise of its discretion in restricting the cross-examination of Ruth.

### E. Improper Waiver of Jury Right

Jonathan Garrett's final objection is that his Sixth Amendment right to a trial by jury at the forfeiture stage was not properly waived inasmuch as there was only an oral waiver by counsel, not a written waiver by Garrett himself. First, we must determine whether there is a right to a trial by jury at the forfeiture stage of a proceeding under section 848 and, if so, whether a defendant's waiver of that right must be in writing. A forfeiture pursuant to the provisions of section 848 is plainly a criminal, as opposed to civil, matter. As the Third Circuit has observed:

> Unlike the traditional _in rem_ forfeiture proceeding against contraband or articles put to use in criminal activities, _see, e.g._, 21 U.S.C. Section 881 (1976), criminal forfeiture proceedings of sections 848(a)(2) are _in personam_. Cf. 18 U.S.C. Section 1963 (1976) (the _in personam_ criminal forfeiture provisions of RICO).

_United States v. Long_, 654 F.2d 911, 914 (3d Cir.1981). It follows that under the Sixth Amendment, a criminal defendant is entitled to a jury trial on the issue whether a particular asset is forfeitable. Accordingly, Rule 31 of the Federal Rules of Criminal Procedure provides, "(i)f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Fed.R.Crim.P. 31(e).

It is equally evident that waiver of a defendant's jury right in a section 848 forfeiture proceeding must be in writing. Rule 23 of the Federal Rules of Criminal Procedure explicitly states, "(c)ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed.R.Crim.P.23(a). We see no reason to hold this rule inapplicable to those stages of a section 848 proceeding which follow a guilty verdict.[6]

Next, we must determine whether Garrett has made out a valid claim of improper waiver. We begin with the observation that the purpose of Rule 23(a) is to ensure that a criminal defendant is aware of his jury right before waiving it and that any waiver is personal and unequivocal. In order to maintain its effectiveness in protecting the underlying constitutional guarantee, we require strict compliance with the rule. Thus reversal is warranted where there is no written waiver signed by the defendant in the record and the defendant asserts either that he was unaware of his jury right or that he did not consent to its waiver.

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[6] Thus we reject the government's distinction between the trial on the issue of guilt and subsequent determinations, and the government's characterization of forfeiture as "essentially a matter of punishment" indistinguishable from ordinary sentencing.

This is not to say that the court will invariably grant relief for purely technical violations of the rule, as where a defendant knowingly acquiesced in a waiver which was never reduced to writing. If the defendant admits, or the government plainly demonstrates, that at the time of the waiver, the defendant was not ignorant of his jury right and consented to the waiver, reversal would not be in order, for the defendant cannot complain on appeal of an alleged error invited or induced by himself. See United States v. Page, 661 F.2d 1080, 1082-83 (5th Cir.1981), cert. denied, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed. 2d 136 (1982).

It is unclear from Garrett's appellate briefs whether he presents us with a purely technical claim.[7] Moreover, the record is silent as to whether Garrett was in fact cognizant of his jury right and agreed to counsel's oral waiver, hence inviting error by remaining silent.[8]

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[7] In his main brief, Garrett does not assert that he was denied the right to a jury trial; rather, he urges reversal on the ground that the record contains "neither a written waiver by appellant nor any indication that he was ever made aware of his rights to a jury trial on the forfeiture issue, let alone waived said right." In his reply brief, however, Garrett states that "his attorney in a chambers conference, which appellant neither attended nor was he aware of, waived jury on the forfeiture. Thus, appellee is incorrect when it claims that all the 'relevant parties' agreed to the jury waiver. Appellant did not ... The bottom line is that Garrett was denied his constitutional as well as statutory right to a jury determination of the forfeiture issue as to the Sun Chaser III."

[8] The silence of the record may be attributed in large part to Garrett's failure to challenge the jury right waiver in his motion for a new trial or otherwise to bring this issue to the trial judge's attention.

We therefore remand to the district court for an evidentiary hearing on this issue. Unless the government succeeds in proving Garrett's knowledge and consent, express or implied, Garrett must be afforded a new trial, before a jury, on the forfeiture issue, only if the augmented record firmly establishes Garrett's knowledge and consent will the forefeiture order stand.

In concluding, we note:

> that it would have been better to do as the rule directs and that much could be said for enforcing it strictly as to such an entire waiver of jury trial. The right involved is a precious one; and a mechanical application of the express, bright-line provision of Rule 23(a) safeguarding it would not be whollly

> amiss; no written waiver signed by the defendant, no bench trial.

Page, 661 F.2d at 1081 (footnote omitted). Although we recognize the invited error exception introduced in Page and, in this case, remand for an evidentiary hearing, we emphasize that the exception is a narrow one and that under Rule 23(a) the primary responsibility for protecting the right to trial by jury rests on trial judges and prosecutors. Having explicitly held that the Sixth Amendment and Rule 23(a) apply to forfeiture proceedings under section 848, we will uphold a bench trial on the forfeiture issue conducted without a signed waiver only in an extraordinary case such as Page.

## III. CHRISTOPHER GARRETT'S CLAIMS

### A. Bruton violation

Christopher Garrett argues that

admission of the incriminating confession of a non-testifying co-defendant Jonathan Garrett, abridged his Sixth Amendment right of cross-examination. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 10 L.Ed.2d 476 (1968), the Supreme Court held that where there is a substantial risk that the jury, despite instructions to the contrary, will look to the incriminating extra-judicial statements of one co-defendant in detering the guilt of another co-defendant admission of the former's confession in a joint trial violates the latter's confrontation right. Subsequent decisions establish that in order to invoke the Bruton doctrine, the confession in question must directly, rather than indirectly, implicate the complaining defendant. See United States v. Castro, 596

F.2d 674, 676 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979); *United States v. Stewart*, 579 F.2d 356, 359 (5th Cir.), cert. denied, 439 U.S. 936, 99 S.Ct. 332, 58 L.Ed. 2d 332 (1978); *United States v. Hicks*, 524 F.2d 1001, 1003 (5th Cir.1975), cert. denied, 424 U.S. 956, 96 S.Ct. 1417, 47 L.Ed. 2d 353 (1976).

In this case, government witnesses related out-of-court statements in which Jonathan Garrett, who did not take the stand, referred to "underlings" and "charges" in connection with his drug smuggling scheme. These isolated references to anonymous subordinates by no means directly implicated Christopher Garrett. Given the extensiveness of the activies to which Jonathan confessed, it was obvious, without his saying so, that others were involved. In confirming that he received the assistance of others, however, he did not provide the slightest hint as to their particular indentities. Here, unlike in Serio v. United States, 401 F.2d 989, (D.C. 1968), which Christopher cites in support of his claim, there was not the "well-nigh inevitable association of (the defendant) as the 'other man' referred to in (his codefendant's) confession." Id. at 990.

In view of the non-inculpatory nature of the confession, as well as the cautionary instruction given by the trial court, we conclude that there was no substantial risk that the jury looked to Jonathan's confession as bearing on Christopher's guilt. We therefore hold that admission of the confession did not infringe Christopher Garrett's rights under the confrontation

Clause.

B. Transference of Guilt

Finally, Christopher Garrett asserts that the trial court's instructions were insufficient to prevent the jury from confusing him with his brother and that severance was required to prevent the prejudicial effect of the charges and evidence against his brother from "spilling over" onto him. We conclude that the safeguards employed or available adequately dealt with any potential confusion and that the district court did not abuse its discretion in refusing to sever appellants' trials.

The dangers of confusion and "spillover" were directly addressed by the trial court's specific instructions that "(e)ach offense and the evidence pertaining to it should be considered separately. Also, the case of each Defendant should be considered separately and individually." In addition, the availability of cross-examination provided defense counsel with the opportunity to dispell any confusion occasioned by the vague or erroneous testimony of prosecution witnesses. As for the possiblity that the jury was influenced by the abundant evidence against Jonathan in passing on Christopher's guilt, the numerous questions posed by the jury to the court during deliberations and the fact that the jury acquitted Christopher on all but one count (of which the evidence of guilt was compelling) indicate that the jury carefully considered the evidence supporting each charge aginst each of the defendants. See United States v. Phillips, 664 F.2d 971, 1017

(5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354, ___ U.S. ___, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982); *United States v. Hawkins*, 661 F.2d 436, 453 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287; 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355; ---U.S.--- 103 S.Ct. 72, 74 L.Ed.2d 71(1982); *United States v. Zicree*, 605 F.2d 1381, 1389 (5th Cir.1979), *cert. denied*, 445 U.S.966, 100 S.Ct. 1656, 64 L.Ed. 2d 242 (1980); *Tillman v. United States*, 406 F.2d 930, 936 (5th Cir.), *vacated in part on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742, (1969). As the former Fifth Circuit pointed out in *Phillips*:

> Denial of a motion for severance is reversible only for an abuse of discretion and a showing of

> compelling prejudice must be made before a trial court's ruling will constitute an abuse of discretion... The remedy of severance is justified only if the prejudice flowing from a joint trial is clearly beyond the curative powers of a cautionary instruction.

664 F.2d at 1016-17 (citations omitted). This court has repeatedly stated that "(i)n order to demonstrate an abuse of discretion, the defendant must establish that the joint trial subjected him not just to some prejudice, but to compelling prejudice against which the district court could not afford protection." United States v. Harper, 680 F.2d 731, 733 (11th Cir.), cert. denied, ----U.S.---, 103 S.Ct. 229, 74 L.Ed.2d 182(1982); see also United States vs. Kabbaby,

672 F.2d 857, 861(11th Cir.1982) ("defendant bears a heavy burden in demonstrating clear and compelling prejudice"); United States v. Tombrello, 666 F.2d 485, 492 (11th Cir.), cert. denied, 456 U.S. 994, 102 S.Ct. 2279, 73 L.Ed.2d 1291 (1982) ("defendant...must demonstrate compelling prejudice against which the trial court will be unable to afford protection").

We conclude that in this case the jury could "collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct," Phillips, 664 F.2d at 1017, and that the problem of the jury's confounding the two Garretts was minimized. Since Christopher Garrett is unable to demonstrate compelling prejudice, we hold that the denial of his motion for severance did not render his trial unfair and was not an abuse of discretion.

AFFIRMED in part and REMANDED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. Court of Appeals
Eleventh Circuit
Filed
Mar 13, 1984
Spencer D. Mercer
Clerk

---

No. 81-6205

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN GARRETT and
CHRISTOPHER GARRETT

Defendants-Appellants.

- - - - - - - - -

Appeal from the United States District
Court for the Northern District of Florida

- - - - - - - - -

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion ____January 23, 1984____, 11 Cir.,
198_, ____F.2d____).
vacated with opinion, March 2, 1984.
(Mar 13,1984)
Before FAY and KRAVITCH, Circuit Judges, and
ATKINS*, District Judge.

PER CURIAM:

of appellant Jonathan Garrett
( x ) The Petition for Rehearing/is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

(   ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

(   ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

## Title 21 U.S.C. Section 848.
## Continuing Criminal Enterprise

### Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States --

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

### Continuing criminal enterprise defined

(b) for purposes of subsection (a) of

this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Title 21 U.S.C. Section 952.
Importation of Controlled Substances

> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter,...

Title 21 U.S.C. Section 960.
Prohibited Acts

(a) Any person who --

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

* * *

(b)(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, )
)
Plaintiff, ) NO. CR 81-62 M
)
v. )
)
JONATHAN GARRETT, ) INDICTMENT
ROBERTGORMAN, )
RON DePOE, )
MICHAEL JOHNSON, a/k/a )
MICHAEL MINIKIN, )
)
Defendant. )
)

The Grand Jury charges that:

## COUNT I

Beginning at a time unknown, but on or about September 1979 and continuing through on or about August 27, 1980, within the Western District of Washington and elsewhere, ROBERT GORMAN, RON DePOE, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, Jonathan Garrett, named in this Count as a coconspirator but not as a defendant, and others known and unknown to the Grand Jury, knowingly did conspire to violate Title 21, United States Code, Section 952 by importing into the United States from a place outside thereof, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

## OVERT ACTS

In furtherance of the conspiracy to import marijuana, the following overt acts, among others, were committed within the Western District of Washington and elsewhere.

1. In September 1979, Jonathan Garrett and others rented a house at 3013 - 108th Avenue, S.E., Belleveue, Washington.

2. On October 24, 1979, Jonathan Garrett traveled from Bellevue, Washington to Seattle-Tacoma International Airport where he met Joseph Knowles and ROBERT GORMAN.

3. On or about October 25, 1979, Jonathan Garrett and ROBERT GORMAN solicited Joseph Knowles to participate in the importation of a quanitity of marijuana into the United States.

4. In March 1980, Jonathan Garrett met with Luke Markishtum and RON DePOE.

5. On or about August 23, 1980, Jonathan Garrett rented two rooms at the Red Lion Inn, Port Angeles, Washington.

6. On or about August 23, 1980, Jonathan Garrett, and others on behalf of Jonathan Garrett, solicited Luke Markiantum to assist in the importation of

a quantity of marijuana into the United States.

7. On or about August 24, 1980, Jonathan Garrett rented two rooms at Morton's Resort, Neah Bay, Washington.

8. On or about August 25, 1980, Jonathan Garrett, RON DePOE, Luke Markishtum, Stan Markishtum, and others visited the Sooes River on the Makah Indian Reservation, Neah Bay, Washington.

9. On or about August 25, 1980, Stan Markishtum and MICHEL JOHNSON, a/k/a MICHAEL MINIKIN, camped near the Sooes River.

10. On or about August 26, 1980, Jonathan Garrett, using the name William Medlyn, rented a U-Haul vehicle in Lakewood, Washington.

11. On or about August 26, 1980,

Jonathan Garrett, using the name William Adam Medlyn, rented a Jartran truck in Lakewood, Washington.

12. On or about August 26, 1980, RON DePOE and Luke Markishtum each utilized their fishing vessels to transport quantities of marijuana from a "mother ship" to an area on the Makah Indian Reservation, Neah Bay, Washginton.

13. On or about August 26, 1980, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, assisted others in unloading a quantity of marijuana from the DEPOE and Markishtum fishing vessles into a U-Haul truck.

14. On or about August 26, 1980, Jonathan Garrett, RON DePOE, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, and others possessed a quantity of marijuana.

15. During October 1980, Jonathan

Garrett met Luke Markishtum in Los Angeles, California and paid him Forty Thousand dollars ($40,000.00).

All in violation of Title 21, United States Code, Section 963.

## COUNT II

On or about October 24, 1979, JONATHAN GARRETT and ROBERT GORMAN did cause Joseph Knowles to travel in interstate commerce from Panama City, Florida to Bellevue, Washington, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity the unlawful activity being the importation of marijuana in violation of Title 21, United States Code, Sections 952, 960(a)(1) and 960(b)(2), and JONATHAN GARRETT and ROBERT

GORMAN did thereafter perform and attempt to perform acts to promote, manage, establish and carry on and facilitate the promotion, management and carrying on of said unlawful activity by importing a quantity of marijuana.

All in violation of Title 18, United States Code, Section 1952(a)(3) and 2.

## COUNT III

On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did import, and aid and abet the importation, into the United States from a place outside thereof, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 952, 960(a)(1) and 960(b)(2) and Title 18, United States Code, Section 2.

## COUNT IV

On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did possess, and aid and abet the possession, with intent to distribute a controlled substance, that is, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B) and Title 18, United States Code, Section 2.

A TRUE BILL:

DATED MAR. 17 1981

G. SPENCER REEVES
FOREPERSON

/S/
JOHN C. MERKLE
United States Attorney

/S/
FRANCIS J. DISKIN
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, : PANAMA CITY CRIMINAL

vs. : NO MCR 81-00216

JONATHAN GARRETT, :
ROBERT HOSKINS,
CHRISTOPHER GARRETT, : INDICTMENT
DONALD McMICHAELS,
CAESAR GARCIA, SR., :
a/k/a PAPASAN,
NORMAN VICK, :

Defendants. :

THE GRAND JURY CHARGES:

COUNT I

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida, and in divers other districts,

JONATHAN GARRETT
ROBERT HOSKINS,
CHRISTOPHER GARRETT,
DONALD McMICHAELS,
CAESAR GARCIA, SR.,
a/k/a PAPASAN,
and
NORMAN VICK,

did unlawfully, wilfully and knowingly combine, conspire, confederate and agree with each other and with other persons both known and unknown to the Grand Jury, to import into the United States from outside the territorial limits thereof, marihuana, a schedule I controlled substance, in violation of Title 21, United States Code, Section 952; all in violation of Title 21, United Staes Code, Sections 960 and 963.

It was a part of the conspiracy that in or about 1976, JONATHAN GARRETT and others known and unknown to the Grand Jury did combine and confederate to establish and did in fact establish a criminal enterprise existent for the purpose of importing into the United States of America from a place outside thereof multi-ton quantities of marihuana and marihuana "Thai sticks," a schedule I controlled substance.

It was further a part of the conspiracy that during the period from in or about the early part of 1976, and continuing up to July, 1981, JONATHAN GARRETT, ROBERT HOSKINS, CHRISTOPHER GARRETT, DONALD McMICHAELS, CAESAR GARCIA, SR., NORMAN VICK and others known and unknown, did knowingly and intentionally confederate, affiliate, and associate with said enterprise for the purpose of effecting the criminal objectives thereof.

It was further a part of the

conspiracy that the defendants, co-conspirators, would utilize seafaring vessels, instrumentalities of interstate and foreign commerce, to effecuate the importation of marihuana and marihuana "Thai sticks" into the United States of America.

It was further a part of the conspiracy that the defendants, co-conspirators, would utilize the telephone, an instrumentality of interstate commerce, to facilitate the importation of marihuana and marihuana "Thai sticks" into the United States of America.

It was further a part of this conspiracy that JONATHAN GARRETT and DONALD McMICHAELS would function as masters of searfaring vessels which were laden with multi-ton loads of marihuana.

It was further a part of this conspiracy that JONATHAN GARRETT, ROBERT HOSKINS, and CHRISTOPHER GARRETT would recruit people to off-load marihuana from seafaring vessels.

It was further a part of this conspiracy that JONATHAN GARRETT, ROBERT HOSKINS, and CHRISTOPHER GARRETT would find sites to off-load multi-ton loads of marihuana from seafaring vessels.

It was further a part of this conspiracy that CAESAR GARCIA, SR., would provide a warehouse for the purpose of concealing the off-loading of seafaring vessels and concomitant on-loading into trucks and other motor vehicles of marihuana.

It was further a part of this conspiracy that CAESAR GARCIA, SR., would supervise the loading of marihuana into seafaring vessels off the coast of the Republic of Colombia.

It was further a part of this conspiracy that NORMAN VICK would fly an aircraft in countersurveillance during smuggling operations.

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the defendants and other co-conspirators did commit, among others, the following Overt Acts:

1. In or about the month of December, 1976, CHRISTOPHER GARRETT met with Jack Nichols near the Fourchan docks in LaFourche Parrish, Louisiana, and solicited Nichol's help to bring in a boatload of marihuana.

2. In or about the month of December, 1976, JONATHAN GARRETT brought a vessel, the "Buck Lee" into Fourchan Landing, Louisiana, with a load of about 30,000 pounds of marihuana.

3. In or about the month of December, 1976, JONATHAN GARRETT, CHRISTOPHER GARRETT, DONALD McMICHAELS, Thomas Ruth, Jack Nichols and other persons unloaded approximately 30,000 pounds of marihuana from the vessel "Buck Lee."

4. In or about the month of January, 1977, JONATHAN GARRETT gave Jack Nichols a shopping bag containing $50,000 in cash currency.

5. In or about the month of May, 1977, JONATHAN GARRETT, DONALD McMICHAELS, ROBERT HOSKINS, Robert Gorman, Thomas Ruth

and others met at a house in Lake Charles, Louisiana, and planned a marihuana smuggling operation.

6. In or about the month of June, 1977, JONATHAN GARRETT, ROBERT HOSKINS, CAESAR GARCIA, SR., Robert Gorman and others met at a warehouse in LaRose, Louisiana.

7. In or about the month of June, 1977, JONATHAN GARRETT, ROBERT HOSKINS, DONALD McMICHAELS, Doug Hoskins, Robert Gorman and others met at a boat yard near Crown Point, Louisiana.

8. In or about the month of June, 1977, at about 12:00 midnight, a vessel, the "Mr. Frank," arrived with a multi-ton load of marihuana at the boat yard near Crown Point, Louisiana.

9. In or about the month of June,

1977, in the early morning hours, near Crown Point, Louisiana, JONATHAN GARRETT, ROBERT HOSKINS, DONALD McMICHAELS, Doug Hoskins, Robert Gorman and others unloaded several tons of marihuana from the vessel "Mr. Frank" and loaded this marihuana into three trucks.

10. In or about the month of June, 1977, ROBERT HOSKINS and Robert Gorman drove a truck loaded with several tons of marihuana from Crown Point, Louisiana to Hope, Arkansas.

11. In or about the month of January 1979, NORMAN VICK talked to Joe Knowles about smuggling marihuana with JONATHAN GARRETT.

12. On or about January 30, 1979, NORMAN VICK and Joe Knowles travelled by commercial airline from Panama City,

Florida to Atlanta, Georgia.

13. On or about February 1, 1979, Joe Knowles met with JONATHAN GARRETT and NORMAN VICK in Atlanta, Georgia, and discussed importing marihuana.

14. In or about May, 1979, ROBERT HOSKINS telephoned Michael Holman in Panama City, Florida.

15. In or about May, 1979, JONATHAN GARRETT, ROBERT HOSKINS, NORMAN VICK, DONALD McMICHAELS, Michael Holman and others met at the Howard Johnson's Motel in Mobile, Alabama, and discussed importing 40,000 pounds of marihuana.

16. In or about June, 1979, ROBERT HOSKINS told Michael Holman that HOSKINS would pay Holman $45,000 to take the vessel "Morning Star" to Colombia and return with 40,000 pounds of marihuana.

17. In or about June, 1979, ROBERT HOSKINS and Michael Holman travelled from Mobile, Alabama, to Panama City, Florida, to pick up a speedboat which was to be used to off-load marihuana from the vessel "Morning Star".

18. In or about June, 1979, Michael Holman and four other persons took the vessel "Morning Star" from Mobile, Alabama, to Santa Marta, Colombia, South America.

19. In or about June, 1979, CAESAR GARCIA, SR. boarded the vessel, "Morning Star" off the coast of Santa Marta, Colombia, South America.

20. In or about June, 1979, CAESAR GARCIA, SR., told the crew of the "Morning Star" that if they waited through a delay in arranging the loading of the marihuana

aboard the vessel "Morning Star" they would each receive an extra $5,000 and two bales of marihuana.

21. In or about June, 1979, off the coast of Santa Marta, Colombia, the vessel "Morning Star" was loaded with approximately 28,145 pounds of marihuana.

22. In or about June, 1979, on the Gulf of Mexico NORMAN VICK flew an airplane over the vessel "Morning Star" in counter-surveillance.

23. In or about June, 1979, the vessel "Morning Star," carrying 28,145 pounds of marihuana, was boarded by the United States Coast Guard.

24. On or about May 16, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

25. On or about May, 1979, JONATHAN

GARRETT and Joe Knowles drove down the coast of California from San Francisco to Los Angeles looking for sites to off-load marihuana.

26. On or about June 1, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

27. On or about June 13, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

28. On or about July 18, 1979, CHRISTOPHER GARRETT talked to Joe Knowles by telephone.

29. On or about July 19, 1979, CHRISTOPHER GARRETT and Joe Knowles inspected the vessel "Clipper Cozumel" at the city marina in Panama City, Florida, and discussed using this vessel to smuggle marihuana.

30. On or about July 24, 1979, Joe Knowles met JONATHAN GARRETT in Room 831 of the Omni Hotel in Atlanta, Georgia, and discussed importing marihuana into the United Sttes. JONATHAN GARRETT gave Joe Knowles $1,000.

31. On or about July 25, 1979, Joe Knowles met CHRISTOPHER GARRETT at the Sheraton Inn in Kenner, Louisiana, and discussed a plan to import marihuana.

32. On or about August 18, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

33. On or about August 22, 1979, JONATHAN GARRETT telephone Joe Knowles in Panama City, Florida.

34. On or about October 25, 1979, Joe Knowles met with JONATHAN GARRETT, DONALD McMICHAELS, Robert Gorman and

others in Bellevue, Washington, and discussed plans to import a shipload of marihuana.

All in violation of Title 21, United States Code, Sections 960 and 963.

## COUNT II

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

JONATHAN GARRETT
ROBERT HOSKINS
CHRISTOPHER GARRETT
DONALD McMICHAELS
CAESAR GARCIA, a/k/a PAPASAN
and
NORMAN VICK

did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with each other and with other persons both known and unknown to the Grand Jury, to possess with intent to distribute and to distribute marihuana, a schedule I controlled substance, in violation of Title 21, United States Code, Section 841; all in violation of Title 21, United States Code, Section 846.

## COUNT VII

That on or about June, 1979, in the Northern District of Florida,

JONATHAN GARRETT

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 846; in violation of Title 21, United States Code, Section 843(b).

### COUNT VIII

On or about June 13, 1979, in the Northern District of Florida,

**JONATHAN GARRETT**

defendant herein, did knowingly, willfully and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

### COUNT VIII

On or about June 13, 1979, in the Northern District of Florida,

**JONATHAN GARRETT**

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

COUNT IX

That on or about August 8, 1978, in the Northern District of Florida,

JONATHAN GARRETT

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

COUNT X

That on or about August 22, 1978, in

Northern District of Florida,

**JONATHAN GARRETT**

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

## COUNT XI

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

**JONATHAN GARRETT**

defendant herein, unlawfully, willfully, knowingly and intentionally did engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1), 843(b), 846, 952 and 963, which violations were part of a continuing series of violations of said statutes undertaken by said defendant in concert with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, or manager, and from which continuing series of violations the defendant obtained substantial income and resources to which the United States is entitled for forfeiture including all profits obtained by the defendant, JONATHAN GARRETT, arising from his participation in this enterprise, and any of his interest, property, and contractual rights of any kind affording a source of influence over this enterprise, including but not limited to a yacht described and identified as the "Sun Chaser III," in violation of Title 21, United States Code, Section 848.

### COUNT XII

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

**ROBERT HOSKINS**

defendant herein, unlawfully, willfully, knowingly and intentionally did engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1), 843(b), 846, 952 and 963, which violations were part of a continuing series of violations of said statutes undertaken by said defendant in concert with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, or manager, and from which continuing series of violations the defendant obtained substantial income and resources to which the United States is entitled for forfeiture, including all profits obtained by the defendant, ROBERT HOSKINS, arising from his participation in this enterprise, and any of his interest, property, and contractual rights of any kind affording a source of influence over this enterprise; in violation of Title 21, United States Code, Section 848.

A TRUE BILL:

/S/
FOREPERSON

July 16, 1981
DATE

/S/
ASSISTANT UNITED STATES ATTORNEY

/S/
DANA BIEHL, SPECIAL ATTORNEY
Department of Justice

/S/
RONALD LeGRAND, SPECIAL ATTORNEY
Department of Justice

# RESPONDENT'S

# BRIEF

Office - Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 83-1842

---

# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

JONATHAN GARRETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## QUESTION PRESENTED

Whether petitioner's prosecution and sentence for engaging in a continuing criminal enterprise violate the Double Jeopardy Clause in light of his prior prosecution for marijuana smuggling.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1842

JONATHAN GARRETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 727 F.2d 1003.

### JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A petition for rehearing was denied on March 13, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count I); conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count II); use of a telephone to facilitate illegal drug activity, in violation of 21 U.S.C. 843(b)(Count VII); and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count XI). On Counts I and II petitioner was sentenced to consecutive terms of five years' imprisonment and cumulative fines of $15,000. On Count VII he was sentenced to a consecutive four-year term of imprisonment and fined an additional $15,000. On Count XI petitioner was sentenced to a concurrent term of 40 years' imprisonment and fined $100,000.[1] In addition, the district court ordered the forfeiture of petitioner's interest in a yacht. The court of appeals affirmed petitioner's conviction but remanded for a hearing to determine whether petitioner had waived his right to a jury on the forfeiture question (Pet. App. A1-A52).

1. The evidence at trial, which petitioner does not dispute, showed that in 1976 petitioner brought his shrimping vessel containing approximately 30,000 pounds of marijuana to a dock in Leeville, Louisiana. Jack Nichols was among the numerous individuals who assisted in the docking of the vessel. Nichols was paid $10,000 for his efforts. 1 Tr. 141-142, 147-148. In late December 1976, Nichols and his former employee, Thomas Ruth, participated in the offloading of another of petitioner's vessels, the *Buck Lee*, which had a cargo of 35,000 pounds of marijuana. Two weeks later petitioner, who had supervised the offloading, paid Nichols $50,000 in cash; in turn, Nichols gave Ruth $8,000. In the spring of 1977, Nichols assisted petitioner and several associates in a search for suitable offloading sites in Louisiana. 1 Tr. 157-159; 2 Tr. 139-142.

In May 1977, petitioner and Ruth went to Port Arthur, Texas, to inspect a vessel, the *Mr. Frank*, which was being

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[1] These sentences are concurrent to the sentence of five years' imprisonment and a $15,000 fine previously imposed in the Western District of Washington for importation of marijuana (see page 6, *infra*).

modified to allow it to carry a large load of marijuana (2 Tr. 150-152). Shortly thereafter, the *Mr. Frank* was sent to South America to receive a cargo of marijuana. In June 1977, the *Mr. Frank* reached the Intercoastal Canal. Petitioner gathered his offloading crew at a dockside warehouse in Larose, Louisiana, which at the time was the intended offloading site. 2 Tr. 294-298. However, a member of the group notified petitioner that he believed law enforcement officers were conducting a surveillance of the area. Because of the imminent arrival of the vessel, petitioner needed an alternate offloading site immediately, and he offered to pay Ruth $200,000 to locate another suitable location that same day. Ruth made arrangements with the owner of a shipyard at Crown Point, Louisiana, to use those facilities for the offloading, and petitioner was satisfied with that location. 2 Tr. 147-148, 156-158. The offloading crew was notified of the change of location and proceeded to Crown Point (2 Tr. 299-300). The *Mr. Frank* arrived later that evening. Petitioner, together with Ruth and the shipyard owner, sailed to the *Mr. Frank*. The shipyard owner went aboard, and petitioner and Ruth returned to shore. Under petitioner's supervision, 17 individuals removed 49,000 pounds of marijuana from the vessel and loaded the cargo onto several trucks. At least two of the trucks were dispatched to Arkansas. 2 Tr. 158-161.

In Arkansas, petitioner paid Ruth $50,000 and directed him to purchase a farm that could be used to store future shipments of marijuana. Accompanied by Nichols, Ruth located a farm for sale. He paid $6,000 of the $62,000 purchase price; Nichols provided a $20,000 loan and petitioner furnished the rest of the purchase funds. 1 Tr. 175-178; 2 Tr. 165-166. A week or two later petitioner paid Ruth $130,000 (2 Tr. 94-95, 167-168). He also repaid Nichols' $20,000 loan (1 Tr. 182-183). Thereafter, the farm was used to conceal two truckloads of marijuana that had arrived on the *Mr. Frank* (1 Tr. 181; 2 Tr. 169).

At petitioner's direction another truckload of marijuana delivered by the *Mr. Frank* was driven to one of petitioner's storage locations on a farm owned by Thomas Gorman in DeRidder, Louisiana (2 Tr. 305-306). After being stored at the farm for a short time, the marijuana was transferred to another truck and driven by Gorman's brother, Robert, on a circuitous three-week journey to a truck stop in Arkansas, where he was met by two individuals. These men drove off in the truck and Robert Gorman followed them in another vehicle to Ann Arbor, Michigan. There, the two men drove the truck out of Gorman's sight for a short while; when they returned, it was empty. Gorman took the truck back to Ruth's farm in Arkansas. 2 Tr. 309-313.

In the meantime, law enforcement officers commenced surveillance of Thomas Gorman's farm in DeRidder, Louisiana. On June 26, 1977, officers followed two trucks that had been driven from the farm to a private road leading to a residence in a sparsely populated area near Austin, Texas. The officers watched the truck enter the private road; later, when the truck emerged from the road, it was stopped. Marijuana debris discovered in the storage compartment indicated that the truck had just been used to deliver a large quantity of marijuana. 3 Tr. 66-71, 75-79, 168-171, 180-182. As other vehicles left the private road, they also were stopped, and most were found to contain quantities of marijuana (3 Tr. 172-173, 200-203).

In November 1978, petitioner decided to purchase a shrimp trawler in Corpus Christi, Texas. He summoned Norman Vick, an acquaintance from Panama City, Florida, to handle the purchase as a straw party and to equip the vessel with advanced electronic equipment. Petitioner gave Vick a briefcase containing $90,000 to be used for the purchase. In December, after Vick made a down payment of $10,000 and began to install the equipment, petitioner told Vick to take the vessel to a spot off the coast of Colombia to obtain marijuana. Petitioner added that Vick would soon be contacted by designated crew members. Electing not to participate in that venture, Vick cancelled the purchase, removed some of the electronic equipment, and returned to Panama City. Later, Vick gave petitioner's attorney the balance of the funds that petitioner had provided for the purchase of the vessel. 4 Tr. 43-68.

In 1978 and again in 1979, petitioner supervised plans to steal large vessels that were manufactured in Seekonk, Massachusetts, for delivery to customers in Louisiana. According to these plans, one of petitioner's associates, a sea captain employed by the actual purchaser of the new vessels, would arrange to be designated by his employer to sail the vessels from Massachusetts to Louisiana. En route the vessels would be diverted to Colombia by other conspirators to take on a large load of marijuana; after delivering the cargo to the United States, the vessels would be returned to the rightful owners. Petitioner attended planning meetings in California, Washington, Georgia, and Florida, but the thefts were never carried out. 4 Tr. 77-83; 5 Tr. 161-184, 197-205, 221-223; 6 Tr. 17-40.

Petitioner also engaged in marijuana smuggling activities on the West Coast. On August 27, 1980, petitioner delivered a boatload of marijuana to Neah Bay, Washington. Approximately 15 to 20 people assisted in the offloading. However, the delivery was only partially successful because one raft carrying bales of marijuana to shore overturned in the bay, and a rental truck that was to be used to transport the marijuana became mired in the sand and had to be abandoned. On the following day local police retrieved 64 bales of marijuana from the water and discovered the fully loaded disabled truck. 7 Tr. 60-81, 102-107.

On June 23, 1981, petitioner was arrested after being involved in an automobile accident near Carmel, California. When taken to the hospital for treatment of his injuries, he was found to have cocaine in his blood stream. 6 Tr. 211, 222. Upon his release from the hospital, petitioner was taken to the interview room of a police station and advised of his rights. After acknowledging that he was aware of his rights, petitioner said that he did not sell drugs but only transported them; that the police were unaware of whom they had arrested; and that he was a smuggler. Petitioner also admitted that he had earned millions of dollars through smuggling. 6 Tr. 225-226, 228.

Later that day a DEA agent met with petitioner and gave him *Miranda* warnings. Because petitioner stated that his lawyer had instructed him not to talk with the police, the agent declined to conduct an interview even though petitioner had waived his rights. 6 Tr. 235. Nonetheless, petitioner made several spontaneous comments, including an admission that he had just paid $13,000 for a vehicle that he used for smuggling and had registered in a fictitious name (6 Tr. 236, 238).

On the following day petitioner told another agent that he had never used violence in his smuggling activities and was in the smuggling business for the adventure rather than for the money (6 Tr. 244-245). Petitioner also commented that large bail bonds were hurting people; that a $100,000 bond was "no big deal"; but that $3 million would "fill 11 or 12 suitcases" (6 Tr. 244). Petitioner added that several years before he had "decided to run in the fast lane" and that "now he was going to have to pay the piper" (*ibid.*).

2. On March 17, 1981, petitioner was charged in a four-count indictment in the Western District of Washington for violations of federal drug laws arising from the marijuana smuggling activity in Neah Bay, Washington (Pet. App. D1-D9). On May 18, 1981, he entered a plea of guilty to one count of importation of 12,000 pounds of marijuana. Petitioner was sentenced to five years' imprisonment and a $15,000 fine. Pet. 5; Pet. App. A4-A5.

3. On July 16, 1981, the indictment in the instant case was returned in the Northern District of Florida (Pet. App. E1-E23). Insofar as relevant here, the indictment charged petitioner with conspiring to import marijuana (Count I), conspiring to possess marijuana with intent to distribute it (Count II), using a telephone to facilitate illegal drug activities (Count VII), and engaging in a continuing criminal enterprise (CCE) (Count XI).

In its instructions to the jury, the district court defined the elements of the CCE offense (8 Tr. 16-21). In particular, the court advised the jury that, in order to convict petitioner of the CCE offense, it had to find that he had committed a felony under Title 21 of the United States Code and that "the commission of the felony under Title 21 was a part of a continuing series of violations" (8 Tr. 16-17). As the court further explained:

> The term "series" generally means three or more, and the term "continuing" means enduring, subsisting for a definite period or intended to cover or apply to successive, similar occurrences.
>
> Therefore, you must find beyond a reasonable doubt that [petitioner] committed three or more successive violations of Title 21 over a definite period of time with a single or substantially similar purpose.
>
> In order to find [petitioner] guilty under the second element, you must find beyond a reasonable doubt that [petitioner] committed at least three Title 21 offenses, and that conduct constitutes a total of three or more violations committed by [petitioner] over a period of time with a single or similar purpose. This will constitute a finding that [petitioner] engaged in a continuing series of violations.

*Id.* at 19-20; see also *id.* at 40, 48. In connection with the "felony" and "series" elements, the court informed the jury of the categories of crimes that would suffice under the CCE statute; in addition to those charged as offenses in this case (conspiracy to import marijuana, conspiracy to possess marijuana with intent to distribute it, and telephone facilitation of illegal drug activity), on which the jury had already been instructed (*id.* at 12-18), the court listed possession of marijuana with intent to distribute it, distribution of marijuana, and importation of marijuana (*id.* at 18-19, 21-22). The court did not identify specific criminal acts for the jury to consider as predicate offenses on the CCE count. The jury convicted petitioner on the CCE count as well as two counts of conspiracy and one count of telephone facilitation.

4. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A52). Relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982), the court rejected petitioner's claim that the Florida CCE prosecution in this case violated the Double Jeopardy Clause in light of the previous Washington conviction on the substantive importation charge and the use in the Florida trial of evidence relating to the Washington smuggling activities (Pet. App. A18-A25). The court concluded that there was no successive-prosecution bar to a CCE charge following the defendant's prior conviction for an underlying drug offense.

## ARGUMENT

1. Petitioner contends that prosecution on the CCE count in Florida was barred by the Double Jeopardy Clause because evidence was introduced in that case that related to the substantive drug offense to which he had previously pleaded guilty in Washington.[2] Petitioner argues that, since

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[2] We acknowledge that evidence of the marijuana smuggling at Neah Bay, Washington, for which petitioner pleaded guilty to one count of unlawful importation, was introduced among numerous drug activities as part of the government's case on the CCE offense at the Florida trial.

CCE is predicated on "a continuing series" of drug violations (21 U.S.C. 848),[3] the Washington charge constitutes a lesser included offense of the CCE count and therefore that his conviction on the Washington charge foreclosed a subsequent prosecution for the greater offense of CCE. In petitioner's view, the decision below rejecting this argument is inconsistent with *United States* v. *Middleton*, 673 F.2d 31 (1st Cir. 1982).[4]

At the outset, we note that petitioner's conviction for CCE does not depend in any way on the use at the Florida trial of the substantive Washington offense. The Florida jury convicted petitioner on two counts of drug conspiracy and one count of illegal telephone facilitation of a drug offense. These convictions, which are unchallenged by petitioner, are sufficient to satisfy the elements of Section 848

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See, *e.g.*, 7 Tr. 56-125; see also Pet. 10. However, petitioner incorrectly states (Pet. 6) that the Florida indictment referred to the activities charged in the Washington prosecution. The general and formal reference to "divers other districts" in the conspiracy counts (Pet. App. E1, E15) cannot, as such, be taken to be of substantive significance in this case. See *United States* v. *Chagra*, 653 F.2d 26, 29 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982). Nor should paragraph 34 of the overt acts in the first conspiracy count, in identifying a meeting in Bellevue, Washington, in October 1979 (Pet. App. E14-E15), be understood to refer to the Washington charges. That meeting occurred ten months before the Neah Bay drug smuggling at issue in the Washington prosecution and included several people not involved in the Washington case. Furthermore, nothing in the record indicates that the Neah Bay smuggling was discussed at the Bellevue meeting.

[3] The "series" element of CCE has been construed to require at least three drug offenses. See *United States* v. *Chagra*, 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); *United States* v. *Valenzuela*, 596 F.2d 1361, 1364-1365 (9th Cir. 1979); see also 8 Tr. 17, 19-20.

[4] The other court of appeals decisions cited by petitioner involve the issue of cumulative punishment, not successive prosecution, and are discussed in point 2, *infra*.

that the continuing criminal enterprise involve a series of three drug violations (see note 3, *supra*) that includes a felony offense. See Pet. App. A23 n.4. Thus, this case does not present the question whether the Double Jeopardy Clause prevents the government from relying, as an essential part of its proof, on a substantive offense for which the defendant has previously been convicted. Rather, in its present posture, it is no different than if evidence of the Washington offense had not been introduced in the Florida trial. See *United States* v. *Oberski*, No. 83-1486 (5th Cir. June 8, 1984), slip op. 4234; *United States* v. *Valenzuela*, 596 F.2d 1361, 1364-1365 (9th Cir. 1979). In that circumstance, a subsequent CCE prosecution is not barred by a prior proceeding for an offense that could have been, but was not, included as the basis for the CCE offense. See *United States* v. *Chagra*, 653 F.2d 26 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); see also *United States* v. *Oberski*, slip op. 4235; *United States* v. *Phillips*, 664 F.2d 971, 1008 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982).

In any event, contrary to petitioner's assertion, *Middleton* does not conflict with the court of appeals' decision in this case.[5] In *Middleton*, the defendant was initially indicted in the Southern District of Florida on six counts, including a CCE count, arising out of a marijuana smuggling operation. Approximately one year later he was indicted in the District of Maine for conspiracy to possess marijuana with intent to distribute it and the substantive offense of possession of marijuana with intent to distribute it. Shortly thereafter a superseding indictment was returned in Florida that extended the period of the alleged continuing criminal enterprise. To prove the CCE charge at the

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[5] The decision below is, as the court of appeals recognized (Pet. App. A18-A24), consistent with the Fifth Circuit's decision in *United States* v. *Phillips*, 664 F.2d at 1008-1009.

Florida trial, the government introduced evidence of the marijuana that was involved in the Maine indictment. At the close of the government's case the district court dismissed the CCE count, thereby acquitting the defendant of that charge. In the subsequent Maine trial the district court dismissed the indictment on the ground that jeopardy had previously attached on those offenses in light of the evidence introduced at the Florida proceeding concerning the marijuana that had been seized in Maine.[6]

The court of appeals affirmed the dismissal of the Maine indictment. Stating that "[a]n offense actually relied upon to establish a continuing criminal enterprise under § 848 * * * is a lesser-included offense under that section," the court held that "[a] defendant convicted or acquitted of a crime which includes several essential elements, as § 848 does, may not be tried subsequently for a lesser-included offense" (673 F.2d at 33). The court emphasized that a contrary ruling "would undermine the integrity of [the] final judgment" in Florida and "would detract from the 'particular significance' the law attaches to an acquittal" (673 F.2d at 34 (citation omitted)). Finding that it was not clearly erroneous for the district court to determine that the Maine evidence in the Florida trial might have extended beyond proving a conspiracy in support of the CCE charge (673 F.2d at 33), the court of appeals concluded (673 F.2d at 34):

> If the government could charge Middleton with the substantive offense of possession with intent to distribute even though the district court in Florida may

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[6] The government conceded that the Maine conspiracy charge should be dismissed in view of the Florida trial. Finding that the evidence of the Maine marijuana had not clearly been limited in the Florida trial to proving a conspiracy, the court also dismissed the substantive possession count. As the court of appeals' opinion makes clear, the real dispute in the case related to the use that had been made of the Maine evidence in the Florida trial.

have considered that offense in dismissing the § 848 charge, the integrity and meaning of the judgment of acquittal would be seriously undermined.

* * * * *

> The government should not be allowed to render uncertain the value of a final judgment in this way [by failing to make clear the use of its evidence in the Florida trial] and to take advantage of doing so.

We have substantial reservations about the correctness of *Middleton*, but in any event it does not conflict with the decision in this case. *Middleton* involved the effect of an *acquittal* for *CCE* on a subsequent prosecution for a substantive drug offense, not, as here, the consequences of a *conviction* for a *substantive offense* on a later CCE prosecution. Nothing in the opinion in *Middleton* addresses the quite different situation presented in this case and, especially given the court's emphasis on the significance of an acquittal (see 673 F.2d at 34), there is no reason to assume that the First Circuit would necessarily disagree with the decision of the Eleventh Circuit in this case. Especially since the issue has not arisen frequently or been considered by other circuits, petitioner's reading of *Middleton* does not call for this Court's review.

Moreover, petitioner's theory of double jeopardy fails to recognize that CCE is of a very different stripe from traditional greater-and-lesser offenses (such as murder and manslaughter) or conventional compound-predicate offenses (such as felony murder and the underlying felony). As its elements indicate, CCE does not involve a discrete act or transaction but rather is based on a "series" of drug offenses. Likewise, it does not occur at a single time but instead arises out of a "continuing" course of criminal conduct that can take place over an extended period. And CCE

is directed at "organizer[s]," "supervisor[s]," or "manager[s]" of large-scale drug schemes that involve five or more people and can entail widely changing personnel during the life of the enterprise. As both its structure and legislative history indicate,[7] the CCE statute creates a new criminal offense that is separate from — and not merely an enhanced or aggravated form of — the series of underlying violations.

Petitioner's argument, derived from traditional lesser-included and compound-predicate offenses, is unduly simplistic and does not take account of the particular characteristics of the CCE offense. By treating CCE and the substantive predicate offenses as typical greater-and-lesser crimes, petitioner ignores what the legislature has prescribed. "[T]he 'power to define criminal offenses * * * resides wholly with the Congress' " (*Albernaz* v. *United States*, 450 U.S. 333, 344 (1981), quoting *Whalen* v. *United States*, 445 U.S. 684, 689 (1980)), and Congress "remains free under the Double Jeopardy Clause to define crimes." *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Furthermore, the consequences of petitioner's argument (and in contrast to the decision in *Middleton* upon which he relies) would be to impair the compelling governmental interest in the enforcement of the drug laws: either the government will be substantially hindered in bringing CCE charges against major offenders who were previously prosecuted on drug counts (and perhaps counts that were brought even before the government knew that the defendant was subject to CCE), or it will refrain from prosecuting known drug violators for fear that such a prosecution would in effect immunize the defendant from later charges involving the more serious CCE offense. Neither outcome is consistent with Congress's intent in this area " 'to turn the screw of the criminal machinery — detection, prosecution, and punishment — tighter and tighter.' " *Albernaz* v. *United States,* 450 U.S. at 343 (quoting *Gore* v. *United States,* 357 U.S. 386, 390 (1958)).

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[7] See, *e.g.*, 116 Cong. Rec. 33302 (1970)(remarks of Rep. Eckhardt); *id.* at 33631 (remarks of Rep. Poff).

Indeed, petitioner's argument would lead to particularly insupportable results where, as here, the substantive offenses cannot all be prosecuted in a single proceeding. In this case, the substantive Washington offense and the substantive Florida offenses could not be joined in one venue. Thus, unless petitioner were to avoid prosecution for the Washington offense altogether, the government was required to pursue two separate proceedings. See *United States* v. *Chagra,* 653 F.2d at 32; cf. *Diaz* v. *United States,* 223 U.S. 442 (1912). In the circumstances of this case, the Florida prosecution involves "none of the governmental overreaching that double jeopardy is supposed to prevent." *Ohio* v. *Johnson,* No. 83-904 (June 11, 1984), slip op. 9. On the contrary, by calling upon petitioner to answer for his nationwide drug trafficking activity, it merely afforded the government "one full and fair opportunity to convict those who have violated its laws" (*ibid.*).[8]

2. Petitioner's sentence on the CCE count is consecutive to his sentence in the Washington case. The first question presented in the Petition (at i) refers in passing to the validity of petitioner's "punishment" as well as his "prosecution" on the CCE count in light of the previous Washington proceeding.[9] Similarly, in the third question presented (Pet.

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[8] Petitioner concedes (Pet. 20) that the Florida prosecution was "facially warranted." Certainly the Double Jeopardy Clause should not be construed to be at war with practices that are justified by sound policy and common sense.

[9] The Petition makes no reference to the sentences imposed on the various counts in this case. The sentence of 40 years' imprisonment on the CCE count is concurrent with the combined 14-year term of imprisonment on the conspiracy and telephone facilitation counts; the $100,000 fine on the CCE count is in addition to the fines of $45,000 on the other counts.

ii) and in the discussion of successive prosecutions (Pet. 22-23), petitioner cites to cases that relate not to the prosecution issue but to the issue of multiple punishment. We do not believe that these oblique and passing references present any issue of the validity of petitioner's sentence apart from the issue, discussed above, of the validity of the Florida CCE prosecution itself. See Sup. Ct. R. 21.1(a); Stern & Gressman, *Supreme Court Practice* 457 & n.64 (5th ed. 1978).

Moreover, and consistent with our reading of the Petition, petitioner raised no issue of cumulative sentences in the court of appeals, and the court did not advert to or pass upon any such issue. Thus, even if the Petition might be construed to encompass it, that issue was not preserved below and is not properly presented in this Court. See, *e.g.*, *Berkemer* v. *McCarty,* No. 83-710 (July 2, 1984), slip op. 21-22; *United States* v. *Lovasco,* 431 U.S. 783, 788 n.6 (1977). Rather, if petitioner believes his punishment is illegal, the appropriate procedure would be for him to challenge his sentence under Fed. R. Crim. P. 35 or 28 U.S.C. 2255.[10]

In any event, the issue of the validity of cumulative punishment for CCE and a substantive predicate drug count does not warrant further review in this case.[11] Although there is a conflict on that question,[12] resolution of the issue is of only limited practical importance. Because the CCE statute provides for a maximum sentence of life imprisonment without eligibility for parole,[13] the issue of cumulative penalties does not affect the term of incarceration to which a defendant is subject. Furthermore, even where a defendant has been sentenced to less than life imprisonment, invalidation of consecutive prison sentences on the underlying drug counts has not affected the overall period of imprisonment, since courts in those cases have vacated the entire sentence and remanded for resentencing on the CCE count up to the total sentence originally imposed on all counts.[14]

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[10] It would appear that the fines imposed on the two conspiracy counts in this case may be improper in view of the conviction and sentence on the CCE count. See *Jeffers* v. *United States,* 432 U.S. 137, 154-158 (1977) (plurality opinion). Since the terms of imprisonment on the conspiracy counts run concurrently with the incarceration on the CCE count, no issue of the validity of that aspect of the conspiracy sentences is posed in this case.

[11] The propriety of cumulative punishments under the Double Jeopardy Clause is a matter of congressional intent. See *Missouri* v. *Hunter,* No. 81-1214 (Jan. 19, 1983); *Albernaz* v. *United States,* 450 U.S. 333, 343-344 (1981).

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[12] Compare *United States* v. *Mourad*, 729 F.2d 195 (2d Cir. 1984), petition for cert. pending, No. 83-2067 (consecutive sentences for CCE and substantive predicate offenses valid), with *United States* v. *Gomberg*, 715 F.2d 843, 850-851 (3d Cir. 1983) (consecutive sentences for CCE and substantive predicate offenses invalid), and *United States* v. *Jefferson*, 714 F.2d 689, 700-706 (7th Cir. 1983) (same). See also *United States* v. *Oberski*, slip op. 4235-4236 (cumulative sentences valid if substantive offense not predicate for CCE violation); *United States* v. *Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983), petition for cert. pending, No. 83-6528 (government concession that cumulative sentences were invalid); *United States* v. *Kirk*, 723 F.2d 1379, 1381-1382 (8th Cir. 1983) (noting but not deciding the issue in light of concurrent sentences); *United States* v. *Samuelson*, 697 F.2d 255, 260 (8th Cir. 1983) (same); *United States* v. *Chagra*, 669 F.2d 241, 261-262 (5th Cir.), cert. denied, 459 U.S. 846 (1982) (cumulative fines on CCE and predicate substantive counts in excess of $100,000 maximum for CCE invalid).

[13] See 21 U.S.C. 848(c); *United States* v. *Chagra*, 669 F.2d at 262-266.

[14] See *United States* v. *Mourad*, 729 F.2d at 203-204; *United States* v. *Raimondo*, 721 F.2d at 478; *United States* v. *Gomberg*, 715 F.2d at 851-852; *United States* v. *Jefferson*, 714 F.2d at 707. The Court has recently denied certiorari in a number of cases presenting the general issue of resentencing following reversal of part of an interrelated sentencing scheme. See *Kajfasz* v. *United States*, cert. denied No. 83-5866 (Apr. 16, 1984); *Santana* v. *United States*, cert. denied, No. 83-5729 (Feb. 27, 1984); *Moore* v. *United States*, cert. denied, No. 83-5302 (Nov. 28, 1983): *Hagler* v. *United States*, cert. denied, No. 83-5149 (Oct. 17, 1983); see also *Principato* v. *United States*, cert. denied, No. 83-5888 (Mar. 5, 1984).

Here, while the CCE sentence is consecutive to the five-year term of imprisonment imposed in the Washington case, the Washington conviction is properly viewed not to be a predicate offense for the CCE count in light of the three other convictions in this case (see pages 9-10, *supra*);[15] and in any event it is clear that the district court intended petitioner to serve a total of 45 years' imprisonment and presumably would, upon remand for resentencing, adjust the CCE penalty accordingly if that punishment were held to supersede the Washington sentence. Thus, resolution of the multiple-punishment issue would not alter petitioner's incarceration in this case.[16]

Hence, the only significance in this case of the issue of cumulative penalties for CCE and the predicate Washington offense is the validity of the $15,000 fine imposed on the importation count.[17] Especially given that the issue of cumulative penalties was not properly preserved below or adequately presented in the Petition for Certiorari, we do not believe that review by this Court of a matter of such limited practical consequences would be justified here. Rather, petitioner should be left to challenge his sentence under Fed. R. Crim. P. 35 or 28 U.S.C. 2255 and, if unsuccessful, to seek certiorari at that time.[18]

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[15] This consideration also applies to the $15,000 fine imposed in the Washington case.

[16] We also note that petitioner's sentence of 40 years' imprisonment on the CCE count exceeds the concurrent prison terms on the other counts in this case.

Although petitioner does not advert to it, we are advised that he received a five-year term of special parole in the Washington case. See generally *Bifulco* v. *United States*, 447 U.S. 381 (1980). Any concern that petitioner (who is now approximately 40 years old) might assert with respect to a special parole term at the expiration of his lengthy CCE sentence would be both premature and speculative at this stage. (We also point out that in general, because of the no-parole provision in Section 848, it can be advantageous to a defendant for his total sentence to be apportioned over the predicate and CCE counts rather than imposed entirely on the CCE charge, since he would be eligible for an earlier release from incarceration (see *United States* v. *Jefferson*, 714 F.2d at 692-693); thus, the possibility of sentencing on the predicate counts can work to a defendant's benefit.)

[17] A similiar issue could be raised concerning the $15,000 fine on the telephone facilitation count in this case (see note 10, *supra*). Because petitioner received the maximum $100,000 fine on the CCE count, this aspect of the sentence, unlike the term of imprisonment, could not be adjusted upon a remand for resentencing.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

JULY 1984

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[18] Because the CCE statute authorizes forfeiture as well as a $100,000 fine, many cases would be unaffected even if monetary penalties cannot be cumulated for CCE and the predicate offenses. In light of the foregoing considerations, the Solicitor General did not seek certiorari in *Jefferson* and *Gomberg*.

# PETITIONER'S

# BRIEF

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No. 83-1842

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In The

# Supreme Court of the United States

October Term, 1984

JONATHAN GARRETT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR PETITIONER JONATHAN GARRETT

PHILIP A. DeMASSA
Counsel of Record
RICHARD M. BARNETT
on the Brief,
2150 First Avenue
San Diego, California 92101
(619) 236-0897

*Counsel for Petitioner*

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether 21 U.S.C. Section 848, a Continuing Criminal Enterprise, is a substantive offense whose underlying predicate felony drug offenses necessary for conviction of the CCE charge are lesser included offenses of the greater offense of a Continuing Criminal Enterprise?

2. Whether under the circumstances of this case evidence of importation of marijuana is a lesser included offense of a Continuing Criminal Enterprise charge and the Double Jeopardy Clause of the Fifth Amendment bars successive prosecution and cumulative punishment of Petitioner of the Continuing Criminal Enterprise charge when evidence of importation of marijuana, which was previously used to convict Petitioner of importation of marijuana, is introduced to establish a predicate act of the Continuing Criminal Enterprise charge?

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## OPINION BELOW

The Opinion of the circuit court is set forth in Petitioner's Petition for Writ of Certiorari in No. 83-1842, filed May 11, 1984, at Appendix A1-A52. It is also reported at 727 F.2d 1003 (11th Cir. 1984).

## JURISDICTION

Jurisdiction of this Court is pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTES

The Fifth Amendment to the United States Constitution and applicable statutes are set forth in the attached Appendix.

No. 83-1842

In The

# Supreme Court of the United States

October Term, 1984

JONATHAN GARRETT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR PETITIONER JONATHAN GARRETT

## STATEMENT OF THE CASE

On March 17, 1981, Petitioner was indicted in the Western District of Washington at Seattle. Count II charged Petitioner and Robert Gorman with causing Joseph Knowles to travel in interstate commerce from Panama City, Florida to Bellevue, Washington on or about

October 24, 1979, to facilitate the promotion, management, establishment and carrying on of the importation of marijuana and attempting to perform acts to do the same, all in violation of 21 U.S.C. Sections 952, 960(a)(1), 960(b)(2), 18 U.S.C. Sections 1952(a)(3) and 2. (J.A. 6).[1] Count III charged Petitioner and Robert Gorman, Ron DePoe and Michael Johnson with importing, and aiding and abetting importing on August 26, 1980, at Neah Bay, Washington of 12,000 pounds of marijuana in violation of of Sections 952, 960(a)(1), 960(b)(2), and 18 U.S.C. Section 2. Count IV charged Petitioner, Gorman, Depoe and Johnson on August 26, 1980 at Neah Bay with possessing with intent to distribute 12,000 pounds of marijuana in violation of Sections 812, 841(a)(1), 841(b)(1)(B) and 18 U.S.C. Section 2. (J.A. 6-7).

Petitioner was not charged in Count I which named him as a co-conspirator but not a defendant with conspiracy from a time unknown but at least from September, 1979 through August 27, 1980 in the Western District of Washington "and elsewhere" to import 12,000 pounds of marijuana in violation of Sections 812, 952 and 963. (J.A. 3-6).

Petitioner was arraigned on April 6, 1981 and trial was set for May 18, 1981. (J.A. 1). The Government alleged at a bail hearing in Seattle that Petitioner was pending prosecution in the Northern District of Florida for a continuing criminal enterprise (hereinafter CCE) for marijuana transactions. The Government alleged petitioner was involved

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[1] Joint Appendix, hereinafter referred to as "J.A." Unless otherwise specified all statutory references are to Title 21 United States Code, which are included in full in the attached Appendix.

between 1977 and 1980 with four or five "mother boat" operations. The Government lawyer stated that the Department of Justice originally authorized Seattle to present the CCE count to the grand jury. Instead the CCE count was being considered by the Northern District of Florida grand jury. Petitioner's counsel immediately asked that "we'd be very happy to have it (the CCE count) joined here and prove . . . that we are not guilty of that particular enterprise."[2]

On April 16, 1981 Petitioner moved for a Bill of Particulars seeking particulars on all counts to enable Petitioner "to be protected against a second prosecution for the same offense and plead double jeopardy thereto as guaranteed by the Fifth Amendment . . .". (J.A. 18).

On April 21, 1981 Petitioner moved to Compel Consolidation of Charges so that any CCE count against Petitioner be returned and tried in the Western District of Washington so that all charges against him could be litigated in the same trial, to save Petitioner the expense of two trials, to save Petitioner from subsequent prosecution and cumulative punishments, and to avoid Governmental forum shopping. (J.A. 22-31)[3]

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[2] Motion Proceedings of April 8, 1981, in Western District of Washington, No. CR 81-062M, 6-8. Although these proceedings are not part of the official Eleventh Circuit record, a Motion will be filed to Augment the Record to include this proceeding. Contemporaneous with the filing of Petitioner's Brief, a copy of this transcript will be lodged with the Court.

[3] In its Response to Defendants' Pretrial Motions, the Government stated that since there are presently no charges pending against (Petitioner) in any other Court of the United States . . . there are no charges to consolidate." The Government argued that the Executive Branch had sole discretion to charge a defendant with a crime and to pick the jurisdiction. (J.A. 39-40). The Government refused to disclose most of the Bill of Particulars Petitioner had requested. (J.A. 49-53).

On May 18, 1981 Petitioner pleaded guilty to Count III, importation of marijuana. (J.A. 1). On August 20, 1981, after unsuccessfully attempting to withdraw his plea, Petitioner was sentenced to the custody of the Attorney General for five (5) years, a $15,000 fine, and a special parole term of five (5) years. Counts II and IV were dismissed. (J.A. 54).

On July 16, 1981 Petitioner was indicted in the Northern District of Florida, Panama City Division, in 7 of 12 counts. Count I charged that Petitioner, from January, 1976 to July 16, 1981, conspired in that district and "divers other districts" to import multi-ton quantities of marihuana and marihuana "Thai sticks" in violation of Sections 952, 960 and 963 with the named defendants and "other persons both known and unknown." (J.A. 56-57). Overt Act 34 charged that on or about October 25, 1979, Joe Knowles met Petitioner, McMichaels and Robert Gorman in Bellevue, Washington to discuss plans to import a shipload of marihuana. (J.A. 62).

Count II charged Petitioner from January, 1976 to July 16, 1981 in the Northern District of Florida and "divers other districts" to conspire to possess with intent to distribute marihuana in violation of Sections 841 and 846. (J.A. 62-63). Petitioner was charged in Counts VII, VIII, IX, and X with using a telephone to facilitate a felony in violation of Sections 843(b), 846, 952 and 963. (J.A. 63-64).

Count XI charged Petitioner from January, 1976 through July 16, 1981 in the Northern District of Florida and "in divers other districts" with engaging in a Continuing Criminal Enterprise (CCE) in that Petitioner violated Sections 841(a) (1), 843(b), 846, 952 and 963 as part of

a continuing series of violations in concert with at least 5 other persons, with respect to whom Petitioner occupied a position of organizer, supervisor, or manager and from which series of violations Petitioner obtained substantial income and resources in violation of Section 848. (J.A. 64-65).

On September 23, 1981, Petitioner filed a Motion to Dismiss Counts I, II, and XI, arguing, *inter alia,* that his importation conviction in Seattle barred the CCE count, XI, under the Double Jeopardy Clause. (J.A. 66-73). On September 23, 1981, Petitioner filed a Motion for Bill of Particulars seeking *inter alia,* that the government state "specifically what violations are referred to, and their dates and participants, for each incident relied upon to prove a 'continuing series of violations'," and further the names of the five persons Petitioner organized, and the amount of income the Government intended to rely upon to prove those CCE elements against Petitioner. (J.A. 76). Petitioner sought these particulars, *inter alia,* to protect him against a second prosecution for the same offense and to plead double jeopardy. (J.A. 81).[4]

The district court denied Petitioner's Bill of Particulars Motion on September 28, 1981. (Motion Transcript of September 28, 1981, 53). The district court also denied

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[4] On September 25, 1981 the Government filed its Response to Defendant Jonathan Garrett's Motion for Bill of Particulars and Response to Jonathan Garrett's Motion to Dismiss for Double Jeopardy. The Government objected to a Bill of Particulars, contending the indictment is "a thorough and complete statement of the charges" and that it along with its Rule 16 response "sufficiently apprises (Petitioner) of the charges against him to allow him to prepare his defense and to plead double jeopardy in the event of subsequent prosecution for the same offense." (J.A. 83).

Petitioner's Motion to Dismiss on double jeopardy grounds on September 28, 1981 (M.T. 19) and issued an Order to that effect on October 7, 1981. (J.A. 90-92).

Petitioner was convicted on October 30, 1981 after jury trial of Count I (conspiracy to import marijuana in violation of Sections 952, 960, and 963); Count II (conspiracy to possess with intent to distribute marijuana in violation of Sections 841 and 846), Count VII (use of a telephone to facilitate a felony in violation of Sections 843(b), 846, and 963), and Count XI (engaging in a Continuing Criminal Enterprise in violation of Section 848). (J.A. 92-93).

On November 30, 1981 Petitioner was sentenced as follows: Count I: 5 years imprisonment and $15,000 fine; Count II: 5 years imprisonment and $15,000 fine to run consecutively to Count I; Count VII: 4 years imprisonment and $15,000 fine to run consecutively to Counts I and II and any other sentence; Count XI: 40 years imprisonment and a $100,000 fine to run concurrently with Counts I, II, and VII and consecutive to any other sentence. (J.A. 94-95).

On December 3, 1981 Petitioner filed a Notice of Appeal. (J.A. 96). On March 2, 1984, the Eleventh Circuit Court of Appeals affirmed Petitioner's convictions but reversed the forfeiture of the Sun Chaser III vessel to determine whether Petitioner had waived his right to a jury trial on the forfeiture issue (Petition for Writ of Certiorari, Appendix A1-A52, No. 83-1842, filed May 11, 1984). The Opinion is reported as *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984).

The circuit court rejected Petitioner's argument that the Government was barred by the Double Jeopardy Clause from first prosecuting Petitioner for the substantive offense in Seattle of importation of marijuana and then using that same evidence to convict Petitioner in the subsequent Florida trial of the CCE count. Relying upon *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982), the circuit court rejected Petitioner's argument that Section 848 is a substantive offense (Petition for Writ of Certiorari, A22, 727 F.2d at 1008-1010).

## SUMMARY OF ARGUMENT

The Government charged Petitioner to be involved in a continuing course of unlawful drug conduct. Congress has chosen to proscribe against such continuing conduct and punish severely those that commit such violations by enacting 21 U.S.C. Section 848.

As part of the elements of Section 848, various predicate felony drug violations are necessary to establish the 848 charge. Since 848 is a substantive offense because it requires proof of the established commission of more than 3 underlying predicate drug offenses, importation of marijuana is a lesser included offense when evidence of importation is introduced at the 848 trial.

Petitioner was first prosecuted for importation of marijuana in Washington. Refusing to prosecute Petitioner for all his unlawful conduct, the Government chose to charge the 848 offense in Florida and then use the Washington lesser included offense evidence to convict and punish Petitioner of the greater offense of Continuing Criminal Enterprise. Both successive prosecution and cumulative punishments are barred by the Double Jeopardy Clause of the Fifth Amendment.

## ARGUMENT

### A. Section 848 Was Intended By Congress To Solely Prosecute And Punish The Major Drug Offender For His Continued Series Of Drug Violations In One Comprehensive Statute, Relying Upon Various Completed Felony Drug Violations As Predicate Acts.

Congress has created a unique and powerful offense designed to solely prosecute and punish an offender who commits, oversees, and profits from a continuing series of drug violations. Congress has labeled that continuing series of drugs violations as one unit of prosecution, for which the convicted offender is to receive substantially increased penalties greater than if he had committed any other single violation of the drug law.[5]

It has already been determined that Congress did not intend to allow cumulative punishment for violations of

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[5] A first time Section 848 offender faces a minimum mandatory 10 years up to a possible maximum life term of imprisonment and up to a maximum $100,000 fine without possibility of parole or probation. A second time Section 848 offender faces a minimum mandatory 20 year term of imprisonment up to a possible life term and up to a maximum $200,000 fine without possibility of parole or probation. Section 848 (a) (1) and (c). Section 848 covers all violations of both subchapter I and II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. All other penalties for the other sections of the Act in both subchapters are significantly less: probation and parole are not precluded; there is no minimum mandatory term of imprisonment and the maximum term of imprisonment is 15 years and/or up to a maximum $25,000 fine, for the most serious offenses Sections 841(b), *et seq.*, and 960(b). See attached Appendix, 2, 11.

Section 848 and at least drug conspiracy violations (Section 846) when that violation was part of the same 848 offense. *Jeffers v. United States*, 432 U.S. 137, 155-157 (1977).

### B. Congress Has Defined Section 848 As A Substantive Offense, Whose Underlying Elements Require Particular Drug Offenses To Be Accomplished In Concert With Others.

It is Congress which establishes and defines offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977), *Sanabria v. United States*, 437 U.S. 54, 69 (1978). Once the allowable "unit of prosecution" is defined, that determines the scope of protection afforded by a prior conviction or acquittal. "Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice". *Sanabria v. United States*, 437 U.S. at 69-70.

Congress made a choice when it proscribed a continuing course of unlawful drug felony conduct which a defendant would have to both commit, supervise, and obtain substantial resources from to merit conviction under the severe penalty provisions of 848. Once the executive branch chooses to focus upon a particularized continuing series of drug violations, both by indictment and proof at trial, that continuing course of conduct, or business, cannot be segnented into either subsequent or prior prosecutions and punishments.

Once it is conceded that a single course of conduct is being prosecuted and punished, the government cannot segment either the prosecution or the sentencing, without violating the Double Jeopardy Clause of the Fifth Amendment. *Braverman v. United States*, 317 U.S. 49, 53 (1942), *Sanabria v. United States*, *supra*, 437 U.S. at 73-74.

Section 848 cannot be a conspiracy offense although it has an elemental requirement that the CCE defendant undertake the series of felony drug violations "in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." Section 848 (b) (2) (A).

*Jeffers, supra,* has been erroneously cited to hold that 848 is a conspiracy offense.[6] The *Jeffers* Plurality rejected the government's argument that an "agreement" is not an essential element of 848, arguing that five innocent dupes each acting separately but "in concert with" the ringleader of the continuing criminal enterprise, would meet the requirement of 848. 432 U.S. at 147. The Plurality assumed "for this case" a conviction would be impossible unless concerted *activity* and an agreement were present amongst those involved in the CCE. 432 U.S. at 148-150.

Since it is part of the definitional elements of 848, "concerted activity" between the CCE defendant and his underlings will always be required. However, Congress did not define 848 to solely require for a conviction "concerted activity". Completion of three or more felony drug offenses, organizing, supervising, or managing 5 or more persons and the obtaining of substantial income or resources are also required definitional elements. Section 848(b)(1), (2)(A) and (B). It is precisely because of these mandatory additional elements that 848 is not a conspiracy offense.

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[6] In Petitioner's case, relying upon prior Fifth Circuit precedent construing Section 848 as essentially a conspiracy offense, the Eleventh Circuit also found that an 848 cannot be barred under the Double Jeopardy Clause by a prior substantive offense prosecution. *United States v. Garrett,* 727 F.2d 1003, 1008-1009 (11th Cir. 1984); *United States v. Phillips,* 664 F.2d 971, 10[illegible]9 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136 (1982).

To hold that 848 is a conspiracy offense would unnecessarily rewrite the legal definition of what constitutes a drug conspiracy. The essence of the offense of "conspiracy" is the *agreement* to commit the unlawful act. Conspiracy is an inchoate offense.[7] *Iannelli v. United States,* 420 U.S. 770, 777 (1975). Any additional definitional element is irrelevant. In drug conspiracy law it is not necessary for the Government in the overwhelming number of circuits to allege or prove an overt act.[8]

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[7] "Inchoate" is defined as "Imperfect; partial; unfinished; begun, but not completed . . ." BLACK'S LAW DICTIONARY 686 (rev. 5th ed. 1979).

[8] Virtually every circuit does not require at least as to a Section 846 conspiracy an overt act to be alleged or proven. Therefore, Congress chose to create a common law type of offense of conspiracy. *See, e.g., United States v. Cruz,* 568 F.2d 781, 782 (1st Cir. 1978); *United States v. Knuckles,* 581 F.2d 305, 311 (2d Cir.), *cert. denied,* 439 U.S. 986 (1978); *United States v. Dreyer,* 533 F.2d 112, 117, n.6 (3d Cir. 1976); *United States v. Ricardo,* 619 F.2d 1124, 1128 (5th Cir.), *cert. denied,* 449 U.S. 1063 (1980); *United States v. Dempsey,* 733 F.2d 392, 395-396 (6th Cir. 1984): "Congress chose to create a common law type offense of conspiracy, omitting charge and proof of an overt act as one of its elements." 733 F.2d at 396; *United States v. Umentum,* 547 F.2d 987, 989-991 (7th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Ewing v. United States,* 386 F.2d 10, 15 (9th Cir. 1967), *cert. denied,* 390 U.S. 991 (1968), *but see United States v. Melchor-Lopez,* 627 F.2d 886, 890, 892 (9th Cir. 1980); *United States v. Blasco,* 702 F.2d 1315, 1330 (11th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 275-276, 78 L.Ed.2d 256 (1983). *But see United States v. King,* 521 F.2d 61, 63 (10th Cir. 1975) (indictment under Section 846 need not allege an overt act, but proof of such act is necessary for conviction) *cf. United States v. Smith,* 692 F.2d 693, 696 (10th Cir. 1982). The Eighth Circuit appears to require proof of an overt act, *United States v. Holder,* 560 F.2d 953, 957 (8th Cir. 1977).

Congress has provided in both subchapters of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to proscribe conduct for conspiracy to possess with intent to distribute and conspiracy to import controlled substances.[9] If Congress had chosen to establish a common law type offense of conspiracy without the necessity of alleging or proving an overt act,[10] then Section 848 cannot be concluded to be such a conspiracy because of the numerous additional elements required for its commission.

The Court, in *Jeffers,* interpreting the "in concert" language contained in Section 848 to require proof of an agreement amongst persons involved in the CCE, thereby found that Section 846 is a lesser included offense of Section 848 because Section 848 requires proof of every fact necessary to show a violation under Section 846 as well as proof of several additional elements.[11] 432 U.S. at 149-150.

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[9] Sections 846 and 963 have identical language: "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." App. 8, 13.

[10] See n. 8, *supra.*

[11] Eight (8) Members of the Court so held in *Jeffers* which included the Plurality and the four (4) Dissenters. 432 U.S. at 158-159. Mr. Justice White concurred in *Jeffers* that Jeffers was lawfully convicted for the reasons that *Iannelli v. United States,* 420 U.S. 770 (1975) controlled the case and because the conspiracy proved against Jeffers was not used to establish the CCE charge. The Court noted in *Sanabria v. United States,* 437 U.S. 54, 75-76 (1978) that a subsequent trial for conducting a CCE during the same time period was the "same offense" since the Section 846 violation was a lesser included offense to

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Similarly, other felony drug violations besides conspiracy are also lesser included offenses of Section 848 if such an offense is necessary, or introduced in evidence by the Government, to prove the necessary 848 elements. The particular lesser included offenses cannot and need not be the same for each 848 prosecution. The applicability of a particular lesser included drug offense will depend upon the facts and evidence sought to be introduced by the Government.

It is clear that Congress did not intend to hold accountable as 848 violators those underlings who acted "in concert" with the 848 defendant. If Congress did intend to hold those underlings liable as 848 defendants, those defendants would also be liable for the severe 848 penalties—a result Congress did not intend when it sought to specifically punish "the professional criminal severely when it passed" Section 848. *Jeffers, supra,* 432 U.S. at 156, n. 26.

Acting "in concert" with the 848 defendant does not require that the five or more underlings specifically conspire or agree with the 848 defendant to commit the 848 offense. Such specific intent agreement would be necessary if 848 were a conspiracy offense.[12] Additionally, if

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the Section 848 violation. The Majority indicated that eight Members of the Court agreed to this finding. Although Mr. Justice White joined in that particular portion of the *Sanabria* opinion (Section III, noted at 437 U.S. at 56), his disagreement with the *Jeffers* result is also noted. 437 U.S. at 76, n. 35.

[12] The standard conspiracy jury instruction states, *inter alia:*

> "To act or participate wilfully means to act or participate (in the unlawful plan) voluntarily, and intentionally, and with specific intent to do something the law forbids . . .". 2 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Section 27.05 (3d ed. 1977).

Section 848 is a conspiracy offense, then the five or more underlings would be deemed co-conspirators, a finding which would be legally untenable because the underlings would not also have occupied a position of organizer, etc. or obtained substantial resources, or, committed a continuing series of violations.

The true substantive nature of Section 848 becomes apparent when it is seen that 848 needs the three or more felony drug violations which are *actually* completed so that the 848 defendant obtains "substantial income or resources." 848(b) (2) (B). An inchoate crime such as conspiracy need not be completed; Section 848 requires successful completion of its various elements.

The five or more underlings who are acting "in concert" with the 848 defendant are actually aiding and abetting the commission of portions of the substantive CCE offense. Aiders and abettors need not be shown to be in a conspiracy agreement. *Pereira v. United States,* 347 U.S. 1, 11 (1954). An aider and abettor need not be punished as a principal. Rather, one who aides and abets in one offense with a person engaged in more than one violation of the law as a continuing series of violations is not guilty of aiding and abetting in that continuing series of violations. *United States v. Tarr,* 589 F.2d 55, 60 (1st Cir. 1978).[13]

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[13] In *Tarr, supra,* the court held that one cannot aid and abet those engaged in the *business* of dealing in firearms in violation of 18 U.S.C. Section 922(a) (1) unless he had knowledge that the defendants were involved in such a business at other times and places. Therefore, Tarr, who had been involved in one transaction did not aid and abet the entire business of dealing in firearms. The aiders and abettors to the CCE defendant are similarly situated so that their involvement does not make them guilty of the 848 offense as aiders and abettors, but only as participants to one underlying predicate felony violation.

Since Section 848 requires a defendant to commit a continuing series of violations in concert with five or more persons, with respect to whom the 848 defendant acts as an organizer, etc. and receives substantial income or resources from the completed crimes, Section 848 is a substantive offense.

### C. Having Prosecuted Petitioner For Importation Of 12,000 Pounds Of Marijuana In The Western District Of Washington, The Government Used The Same Evidence To Convict Petitioner Of The Section 848 Offense In A Subsequent Trial In The Northern District Of Florida.

In its Brief for the United States In Opposition, at 8, n. 2 the Government acknowledged that "evidence of the marijuana smuggling at Neah Bay, Washington, for which petitioner pleaded guilty to one count of unlawful importation, was introduced among numerous drug activities as part of the government's case on the CCE offense at the Florida trial." However, the Government contended that Petitioner's CCE conviction does not depend "in any way" on introduction of the substantive Washington offense at the Florida trial. *Id.* at 9.

From the inception of Petitioner's Florida trial, the Government heavily relied upon the Neah Bay, Washington evidence which it had previously used to convict Petitioner in Washington, as an integral piece of evidence on both the conspiracy to import and CCE counts. (Counts I and XI, J.A. 55-62, 64).

The Government's Opening Statement to the Florida jury indicated the conspiracy to import marijuana stretched across the country to Washington State and Thailand. (1 Tr. 56).[14]

To the extent that the Brief for the United States in Opposition sets forth some of the facts developed at Petitioner's trial, those facts are adopted herein. (Brief in Opposition, 2-5). Since the Government's statement of facts ignores the evidence introduced regarding the involvement of Panama City co-defendants, witnesses, and Neah Bay co-operating witnesses admitted at the Florida trial, regarding the Washington evidence, that evidence will be discussed *infra*.

Cooperating defendant Robert Gorman detailed his travel to Washington State and California, meeting with Petitioner and other crew members of the Neah Bay load including Scott Shelton, Don McMichaels, and Harold (Speer), and discussing the scouting of possible offloading sites along the coastline. (2 Tr. 327-331). Gorman subsequently returned to Seattle and spent five (5) months working on the Sun Chaser III, a vessel which was intended to be used for the Neah Bay smuggling venture. (2 Tr. 337). Upon objection, the trial court indicated that it was going to instruct the jury that the testimony concerning the Sun Chaser III was irrelevant to the co-defendants, and was only to be considered by the jury in the continuing criminal enterprise count. (2 Tr. 339, 343).[15]

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[14] Further references to meetings in the State of Washington in furtherance of Petitioner's activities were noted in the same Opening Statement. (See 1 Tr. 82-83).

[15] See also, (2 Tr. 346). The Government sought forfeiture of the Sun Chaser in the CCE count. (J.A. 64-65). However, the forfeiture issue was itself never submitted to the jury for its consideration. *United States v. Garrett*, 727 F.2d 1003, 1012-1013 (11th Cir. 1984). By focusing the jury's attention on the Sun Chaser III and the CCE count the district court and Government directed the jury's specific focus on the Washington events in relation to the CCE count.

The trial court instructed the jury that the Sun Chaser testimony "can only be considered by you in your deliberations concerning Count 11 of the indictment, which is the so called continuing criminal enterprise count, that's the allegation that Jonathan Garrett was engaged in, a continuing criminal enterprise." (3 Tr. 18-19).

As trial progressed, additional evidence was admitted concerning the Neah Bay operation. Drug Enforcement Agent (DEA) William Warner testified that on May 22, 1979, he flew with informant Joe Knowles to San Francisco, California, where Knowles met with Petitioner. (5 Tr. 70-71). Warner gave a number of tape recordings of conversations between Knowles and Petitioner to DEA agent Frank Gill, in Seattle, Washington. (5 Tr. 72-83). On October 23, 1979, Warner also observed Knowles travel to Seattle and meet with Petitioner, and subsequently followed the two to a residence in Bellevue, Washington. (5 Tr. 99-100). Warner also observed Petitioner to meet with Knowels, Don McMichaels, Scott Shelton, and Harold (Speer) in Seattle.[16] (5 Tr. 101).

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[16] This testimony of importation of marijuana preparations was offered to support Overt Act 34 of Count I and Count XI, the CCE count. (J.A. 62, 64-65). In its Brief for the United States in Opposition, the Government alleges that Overt Act 34 should not be understood to refer to the Washington charges, arguing that that October 24 meeting occurred 10 months before the Neah Bay smuggling incident, involved several people not involved in the Washington prosecution, and nothing indicated that Neah Bay smuggling was discussed at the Bellevue meeting. (Brief in Opposition, 8-9, n. 2). The two indictments and proof are inextricably intertwined. Count II of the Seattle indictment charges Petitioner and Robert Gorman on October 24, 1979, with causing Joseph Knowles to travel from Panama City to Bellevue, Washington to facilitate the same 12,000

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Agent Gill testified concerning the seizure of Thai stick marijuana.[17] (5 Tr. 126-127). Gill indicated that 13,000 pounds of Thai stick marijuana was seized on August 27, 1980, on a beach at Neah Bay, Washington, having been discovered by local police and turned over to the DEA. (5 Tr. 128-129).[18]

Joel Knowles[19] traveled on May 22, 1979 to California at the request of Petitioner. They drove the coast of

California from San Francisco to Los Angeles inspecting inlets for offloading sites in anticipation of taking a boat to Africa to pick up hashish and then to Thailand to pick up Thai stick marijuana. They then planned on returning to the west coast of the United States to unload. (5 Tr. 179-183). Petitioner's boat the Sun Chaser III was being rigged out and waiting for such a trip. (5 Tr. 182-183).

Knowles traveled to Seattle on October 25, 1979 to the Sun Chaser III, met McMichaels and Scott Shelton, and generally worked on the upcoming venture. (6 Tr. 31-34).

Michael Johnston, a Neah Bay resident, met Petitioner in the company of Turk Markishtum in August, 1980. (7 Tr. 72-73). That evening, Johnston, and three others, proceeded at Markishtum's direction, to the river located on the reservation, where he encountered Petitioner. Petitioner was examining the river in a boat to determine if the boat could navigate the river. The next evening, August 17, 1980, Johnston saw Petitioner and Markishtum bring bales of marijuana on Markishtum's boat up the river. Fifteen to twenty people participated in the offloading operation, loading the bales of marijuana into a truck. (7 Tr. 74-76). The boats made 3-4 trips, and each time returned loaded with marijuana. (7 Tr. 76-77).[20]

Joseph Martin, Chief of the Neah Bay Police Department, was called to the Makaw Indian Reservation at Neah Bay on August 27, 1980. He observed bales of marijuana

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pounds importation as alleged in Overt Acts 2 and 3 of Count I of the same indictment on the same and next day with the same person—Joseph Knowles. (J.A. 4, 6). It is not possible to argue that when Joe Knowles, as alleged in the Panama City indictment Overt Act 34, met with Petitioner and Robert Gorman in Bellevue the same day (October 25) that the same importation plans were not being discussed. The Panama City trial overwhelmingly establishes the opposite conclusion. Similarly, the Government's argument that the October 25, 1979 meeting included several people not involved in the Washington case is incorrect. (Brief in Opposition, 8-9, n. 2). Petitioner, Knowles, and Robert Gorman are mentioned both in Overt Act 34 of the Panama City Indictment and in the Seattle Indictment in Count I (Overt Acts 2, 3). Finally, Knowles, Robert Gorman, and Michael Johnson testified in the Panama City trial extensively regarding their Seattle activities which also led to the Neah Bay importation charge against Petitioner. See text, *infra*. Both Gorman and Johnson were defendants in the Seattle indictment. (J.A. 3). The Government's Response to Defendants' Pretrial Motions in Seattle also alleged that Knowles, Gorman and Petitioner met in Bellevue, Washington in October, 1979 and "discussed the importation scheme which culminated in August 1980." (J.A. 34).

[17] The Government alleged that the marijuana seized in Seattle was "one of an overall conspiracy" involving Petitioner and Don McMichaels. (5 Tr. 126-127). The marijuana Thai sticks had been referred to in the Government's Opening Statement. (1 Tr. 56, 79, 83).

[18] Samples of that marijuana was introduced as exhibit 64 at Petitioner's trial in Panama City. (5 Tr. 129-131).

[19] Joel Knowles is the same Joseph Knowles in the Seattle indictment in Overt Acts 2 and 3 of Count I and in Count II, (J.A. 4, 6) and Joe Knowles referred to in Overt Acts 11, 12, 13, 24-29, and 32-34 in Count I of the Panama City indictment. (J.A. 59-62).

[20] Johnston identified photographs of equipment seized by law enforcement agents at the offloading site. (7 Tr. 77-79). Michael Johnston is the same Michael Johnson referred to in the Seattle indictment. (J.A. 3).

being field tested by Coast Guard personnel, and bales at the water's edge and floating in the water. (7 Tr. 101-104). Some 64 bales weighing 50 pounds each were seized. Also seized was a three pontoon section raft, which was smashed up on the rocks. (7 Tr. 104-105). Martin also participated in the seizure of a U-Haul truck slightly down the road, from which approximately 3,200 pounds of marijuana were seized. Additional offloading equipment was also seized in the vicinity. (7 Tr. 105-108).[21] The DEA was called by Martin, they arrived on the scene, and the next day took possession of the marijuana. (7 Tr. 115-116).

DEA Agent David Wilma arranged for the transportation of the marijuana from the Neah Bay Police Station to the U.S. Federal Building in Seattle. (7 Tr. 118-119).

Chemist Donald Chinn flew to Panama City from Honolulu, Hawaii to state he examined the substance seized at Neah Bay and determined it was marijuana. (7 Tr. 122-124).

During closing, the Government argued that evidence of the Neah Bay seizure was being used to convict Petitioner on the continuing criminal enterprise charge. The Government noted the testimony of Johnston, Police Chief Martin, the chemist, and the DEA agents all testified concerning the Neah Bay Thai stick operation. (7 Tr. 187-188).

The district court instructed the jury that in order to convict Petitioner of the CCE count, it could consider

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[21] Martin identified a number of photographs introduced as Government exhibits of the scene at Neah Bay at the time of the seizure. (7 Tr. 108-114).

various felony drug violations including conspiracy to import and importation of marijuana. (8 Tr. 17-20). However, the Court never informed the jury which felony the Government may have introduced into evidence which could be those subject to the continuing series of violations CCE requirement.

The jury's notes reflect their confusion over which evidence to consider on the importation and CCE counts, except their focus was clearly on the Seattle evidence they had just heard that day and the previous day regarding the Neah Bay Washington seizure.[22]

The Seattle evidence was used to convict Petitioner of the CCE count in two ways. As the jury's first note indicates, the jury was told the Seattle evidence could be considered by them on the conspiracy to import Count (I). Since the conspiracy to import was one of the Title 21 felony drug offenses the district court instructed the jury it could consider as to the CCE count (XI), the Seattle evidence was used to prove the predicate act of conspiracy to import, necessary for the CCE conviction. Further, this evidence of substantive importation of 13,000 pounds of Thai marijuana had great impact upon the jury coming as it did at the very end of trial and being one of the few instances where concrete evidence (photographs and samples of Thai marijuana, Exhibits 63-64, 73-80) of actual huge seizures of marijuana were actually introduced at trial to corroborate both the Government witnesses and theory of the CCE count. The Government clearly relied on the substantive Washington offense to prove the substantive CCE count.

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[22] The jury's first question was whether it could consider against Petitioner the Indian Reservation in Washington evidence on the conspiracy to import count since that evidence wasn't mentioned in Count I. The district court answered "Yes". (J.A. 97). The jury next inquired as to Count XI whether it had to find Petitioner guilty of committing one felony a series of three times or any three felonies, under Title 21. The district court replied that the Government must prove Petitioner committed at least any three Title 21 offenses. This finding would "cover the first two elements" of the CCE offense. (J.A. 97).

### D. The Subsequent Prosecution Of Petitioner For Violation Of Section 848 Following His Conviction For The Lesser Included Offense Of Importation Of Marijuana Is Barred By The Double Jeopardy Clause.

From the outset of Petitioner's Seattle indictment, the Government plainly intended to prosecute and punish Petitioner twice for the same offense. Although the Government in the Western District of Washington originally intended to prosecute Petitioner on the 848 charge as part of the Seattle indictment, this decision was withdrawn by the Justice Department in Washington, D.C. so that Florida would present the CCE count in a more favorable setting after Petitioner's trial on the Seattle indictment was resolved.[23] Petitioner was thus subjected to the Constitutional Double Jeopardy violation for being twice prosecuted and punished for the same offense, was forced to "run the gauntlet" of prosecution twice, thereby denying Petitioner the right to have one trial on all his criminal liability, was forced into undergoing significant litigation expense and subjected to aggravated punishment for the same course of conduct twice.

As discussed, *supra,* at Arguments A and B, once Congress has defined a continuous course of conduct as the 848 violation, evidence used from a prior prosecution as a predicate act to the 848, bars the 848 prosecution itself. Those predicate crimes necessary to establish the 848 are lesser included offenses of 848 because 848 "requires proof of every fact necessary to show a violation under (the requisite predicate felony drug violations) as well as proof of several additional elements." *Jeffers v. United States,* 432 U.S. at 150.

The *Blockburger* test[24] has traditionally been applied to determine whether two offenses are sufficiently distinguishable to permit cumulative punishment. Although this is a cumulative punishment Double Jeopardy rule, it has been applied to successive prosecution Double Jeopardy analysis because if two offenses are the same for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for barring successive prosecutions. *Brown v. Ohio,* 432 U.S. 161, 166 (1977), citing *In re Nielsen,* 131 U.S. 176, 187-188 (1889).

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[23] Once advised by Government counsel that Petitioner would be tried in Seattle for a portion of his unlawful activity and then reprosecuted in Florida for the same conduct, Petitioner asked that both charges be consolidated in one proceeding. (J.A. 22-31, *see also* Motion Transcript of April 8, 1981, 7-8). Sixty-five days after Petitioner pleaded guilty to the substantive importation charge, he was indicted in Florida. (J.A. 1-2). The Florida trial record shows no felony drug violations Petitioner was alleged to be involved in after the Neah Bay incident in August, 1980. Therefore, the Government cannot argue that a "continuing investigation" led to the Florida indictment being returned July 16, 1981. Petitioner's arrest in Monterey did not occur on June 23, 1981 as stated in the Government's Brief in Opposition, at 5, but rather on July 23, 1981, 7 days after he was indicted in Florida. (6 Tr. 205, 222).

[24] *Blockburger v. United States,* 284 U.S. 299, 304 (1932) states the test: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

The *Blockburger* test cannot be strictly applied; to do so would lead to improper results. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires relitigation of factual issues already resolved by the first. *Brown, supra,* 432 U.S. at 166-167, n.6.

A close analysis of *Blockburger* highlights Petitioner's contention that the CCE continuing course of conduct cannot be constitutionally segmented into separate prosecutable units. Blockburger challenged his three consecutive sentences of narcotics sales because two sales to one person were a single offense and that the charges dividing one act into two violations constituted the same offense for which a single penalty could be imposed. 284 U.S. at 301. The Court rejected Blockburger's argument and distinguished the individually proscribed statutory drug violations against Blockburger from those statutory violations that proscribe a continuous course of conduct.

*Blockburger* highlighted the difference between individually proscribed conduct as compared to proscribed conduct continuous in character:

> The distinction between the transactions here involved and an offense continuous in its character, is well settled, as was pointed out by this court in the case of *In re Snow,* 120 U.S. 274. There it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31, was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

> "It is, inherently, a continuous offence, having duration; and not an offense consisting of an isolated act.
>
> • • •
>
> "A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu.*"
>
> The Narcotic Act does not create the offense of engaging in the business of selling forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. 284 U.S. at 302.

In Petitioner's CCE offense, Congress has proscribed against a continuing series of violations, for which there can be but one prosecution and one penalty. As *Blockburger* emphasizes: "'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty.'" *Blockburger, supra,* 284 U.S. at 302, quoting Wharton's Criminal Law, 11th ed., Section 34, n. 3. Here, although individual felony drug delicts can be punished separately, the CCE offense covers all such predicate offenses in one comprehensive statute as a prohibited course of conduct rather than separate segments of such a course. *Brown v. Ohio,* 432 U.S. at 171. (BLACKMUN, J., dissenting).

The Court has long held that a continuing offense can be committed only once for purposes of prosecution, and the Double Jeopardy Clause bars a second prosecution for one of its incidents. It was held in ***In re Nielsen,*** 131 U.S. 176 (1889):

> where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence. 131 U.S. at 188.

It is immaterial for Double Jeopardy analysis purposes if the conviction of the greater offense precedes or succeeds the conviction of the lesser offense: whatever the sequence, the Fifth Amendment Double Jeopardy Clause forbids the successive prosecution. *Brown v. Ohio,* 432 U.S. at 168-169; *Jeffers v. United States,* 432 U.S. at 151. In Petitioner Garrett's case, the Government prosecuted Petitioner in Seattle for the lesser included offense of importation of marijuana. The subsequent prosecution of Petitioner for the substantive Continuing Criminal Enterprise offense is barred by the Double Jeopardy Clause because of the Government's reliance upon the lesser included offense violation of 12,000 pounds of marijuana evidence. "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for the 'same offense.'" *Jeffers v. United States,* 432 U.S. at 150.

A clearer example of the improper prosecutorial conduct in this case is *State v. Cooper,* 13 N.J.L. 361 (1833) where a subsequent felony-murder prosecution was barred by the previous related arson prosecution on Double Jeopardy grounds: once the offense was prosecuted in its mildest form it "is better that the residue of the offence go unpunished." *Id.* at 376.

The Government sought to prosecute Petitioner for his criminal activity in a "milder" form in Washington.

The residue of Petitioner's unlawful conduct must not be permitted to justify additional prosecution and punishment no matter how desirable it may be to the Government. Such conduct clearly violates the protections of the Double Jeopardy Clause.

Nor does segmenting Petitioner's conduct allow successive prosecutions for both the lesser and greater offenses. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio,* 432 U.S. at 169.

Conflicting with the Fifth and Eleventh[25] circuits in the greater-lesser included offense analysis, *United States v. Middleton,* 673 F.2d 31 (1st Cir. 1982) has correctly found that an offense actually relied upon to establish a Continuing Criminal Enterprise under 848 is a lesser included offense under the CCE count. *Id.* at 33. Either drug conspiracy or substantive drug offenses may serve as the predicate lesser offenses to the CCE charge.[26] *See*

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[25] *United States v. Philips, supra,* 664 F.2d 971; *United States v. Garrett, supra,* 727 F.2d 1003.

[26] Defendant had been indicted in Florida on six (6) counts charging a marijuana smuggling operation, including Section 848. Approximately one year later, Middleton was indicted in Maine for conspiracy to posssess marijuana with intent to distribute. One month later, the Florida grand jury returned a superceding indictment, extending the period of the Continuing Criminal Enterprise violation. At Middleton's Florida trial the Continuing Criminal Enterprise charge was dismissed.

Subsequently, the Maine district court dismissed the conspiracy to possess with intent to distribute marijuana charge, the Government conceding that jeopardy had attached due to

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*also, United States v. Samuelson,* 697 F.2d 255, 260 (8th Cir. 1983).

As the Government argued in ***Middleton,*** the Government argues here that Petitioner's CCE conviction cannot be shown to rely upon the substantive Washington importation offense (Brief in Opposition, 9-10). The First Circuit rejected such an argument. ***Middleton*** laid the responsibility at the Government's door. The Government's failure to specify the predicate offenses for which it introduced evidence for the CCE prosecution would mean that no Double Jeopardy problem would ever arise in a subsequent trial: "We decline the government's invitation. Such an interpretation of our holding in *Chagra* [*United States v. Chagra,* 653 F.2d 26, 31-33 (1st Cir. 1981), *cert. denied,* 455 U.S. 907 (1982)] would undermine the integrity of a final judgment which is primarily what the double jeopardy clause was intended to protect." *Id.* at 33-34. ***Middleton*** held the Government "should not be allowed to render uncertain the value of a final judgment in this way and to take advantage of doing so." *Id.*

Similarly, Petitioner should not be penalized by the Government's studied refusal and failure to specify the evidence it relied upon to prove the underlying predicate acts of the CCE count. It was not for want of trying that Petitioner was unable to determine which predicate acts the Government intended to rely upon. Petitioner's Bill of Particulars motion was clearly designed to acquire such information along with trying to protect him from possible Double Jeopardy implications. (J.A. 76-81). The Government opposed the Motion, claiming the indictment and its Rule 16 response were a "thorough and complete statement of the charges" and "sufficiently apprises (Petitioner) of the charges against him to allow him to prepare his defense and to plead double jeopardy . . .". (J.A. 83).

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the Florida acquittal on the 848 charge. Finding that jeopardy attached, the district court dismissed the *substantive* charge of possession with intent to distribute marijuana because the Government had not limited the use and purpose of the Maine evidence introduced at the Florida trial to proving the conspiracy to possess with intent to distribute.

The Government's segmenting of prosecutions of Petitioner for the same conduct in Washington and then Florida also violated Petitioner's right under the Double Jeopardy Clause to have his criminal liability that grew out of a single criminal act, occurrence, episode or transaction to be prosecuted in one proceeding. As the Government in Washington State candidly admitted, Petitioner's CCE charge was originally authorized in that state. (Motion Transcript, April 8, 1981, 6-8). Despite Petitioner's Motion to Consolidate the upcoming 848 charge in Seattle, the Government consciously chose to segment the prosecution by indicting Petitioner in Florida.

The Double Jeopardy Clause protects Petitioner from the prosecution improperly dividing up the charges against him. Where the charges arise from a single criminal act, occurrence, episode, or transaction, they must be tried in a single proceeding. ***Brown*** *v. Ohio,* 432 U.S. at 170. (BRENNAN, J., concurring).[27]

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[27] *Jeffers* noted that although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, this right under the Double Jeopardy Clause is waived if the defendant elects to have the two offenses tried in separate trials. 432 U.S. at 152, n. 20. Unlike *Jeffers,* Petitioner unsuccessfully attempted to consolidate the charges against him.

Petitioner had a valued right to resolve his liability in one proceeding and to be protected from manipulation, expense, and anxiety by successive trials on the same offense. Where successive prosecutions are at stake, the guarantee provided by the Double Jeopardy Clause serves a Constitutional policy of finality for the defendant's benefit. *Brown v. Ohio,* 432 U.S. at 165.

### E. Petitioner's Cumulative Punishment For The 848 Offense After Being Sentenced On The Lesser Included Importation Offense Is Barred By The Double Jeopardy Clause.

Having first been sentenced to five years and $15,000 fine on the Washington substantive importation offense, the Double Jeopardy Clause forbade the cumulative sentence of 40 years and $100,000 fine on the CCE count in the subsequent proceedings. The Clause protects against multiple punishments for the same offense. *Brown v. Ohio,* 432 U.S. at 165.

Again, the sequence of whether the lesser included or greater offense is punished first is immaterial. The Fifth Amendment guarantee forbids cumulative punishment for a greater and lesser included offense. *Brown, supra,* 432 U.S. at 169.

It is not an appropriate answer to the Constitutional error committed in the cumulative sentencing of Petitioner to 5 years and $15,000 for the lesser offense and then the 40 years and $100,000 fine on the 848 count to state that Petitioner should be resentenced in Florida so that Petitioner still may receive 45 years total imprisonment and a $100,000 fine. The argument would be that the district court in Florida intended to sentence Petitioner to 45 years of imprisonment and a maximum $100,000 fine, and therefore should do so. That argument is speculative, however, and highlights the Double Jeopardy problem, created by first sentencing Petitioner for the lesser included offense.

It can never be clear what aggravating factors the Florida district court considered when it sentenced Petitioner to 40 years and the maximum fine. Section 848 mandates a mandatory minimum 20 year term of imprisonment for a second conviction for the same section. Although it may seem problematic that the Florida district court used this enhancement to sentence Petitioner to more than 20 years, it is not theoretical to argue that Petitioner's CCE sentence was aggravated by the prior conviction and sentence in Washington.

The Florida district court plainly felt that the substantive importation Washington offense was not part of the Florida offense. In its Order denying Petitioner's Motion to Dismiss Counts I, II, and XI (the CCE count), the Florida district court held Petitioner could be prosecuted for both Seattle and Florida offenses separately, and that his Motion was "frivolous." (J.A. 90-92). Viewing the Seattle conduct as a separate offense, which the Florida court plainly did, it is apparent that the district court used that prior conviction to aggravate Petitioner's sentence.

> Any adjustment in punishment for the fact that the defendant already has been punished for the lesser offense is not adequate to cure the injury suffered because of multiple prosecutions, since the double jeopardy problem inheres in the very fact of a second trial for the "same" offense. (Citations omitted) *Jeffers v. United States,* 432 U.S. at 151, n. 18.

Congress did not intend to impose cumulative punishment in the case of 848 and its lesser included offenses. *Jeffers v. United States,* 432 U.S. at 156-157. Since the

Government is barred under the Double Jeopardy Clause from twice prosecuting Petitioner for the same offense, it is similarly barred from punishing Petitioner for the residuum of the same conduct. The result is the same if cumulative punishment is sought at one or successive prosecutions. *Jeffers, supra,* at 153-154, n. 23. "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown v. Ohio, supra,* 432 U.S. at 166.

Petitioner was constitutionally entitled to have his prosecution and punishment decided at one proceeding. Not to do so does violence to Petitioner's strong desire for finality and gives inordinate power to the prosecution to seek more favorable forums for reprosecution and greater sentencing.[28]

The cumulative sentencing of Petitioner in Florida for the same offense for which Petitioner had already been sentenced is barred by the Double Jeopardy Clause.

---

[28] The "rule prohibiting reprosecution after a conviction denies the prosecutor the same control over punishment. Without the rule the prosecutor could continue to prosecute until he found a judge willing to give an 'appropriate' sentence. And if the subsequent judge imposed his sentence cumulatively the defendant would be punished twice for the same offense. The double jeopardy rule forces the prosecutor to accept the first judge's decision on sentencing just as he must accept the first jury's verdict on guilt. Finally, and most importantly, rules against reprosecution, after either prior acquittal or prior conviction, prevent the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendants. A criminal trial warps the defendant's life and consumes his money. The Constitution allows this ordeal to be imposed only once and for reasonable cause, not repeatedly at the prosecutor's whim." Note, *Twice in Jeopardy,* 75 Yale L.J. 262, 278-279, 301-302 (1965).

## CONCLUSION

Congress has proscribed a continuing course of conduct (CCE) to punish the professional criminal with severe penalties. The underlying predicate offenses are lesser included offenses of the CCE. The Double Jeopardy Clause bars both the subsequent Florida prosecution and punishment of Petitioner for the same conduct for which he was previously convicted and sentenced in Washington. The CCE conviction and sentence should be vacated.

Respectfully submitted,

Philip A. DeMassa,

*Counsel for Petitioner*
*Jonathan Garrett*

# APPENDIX

## UNITED STATES CONSTITUTION
## AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## 18 U.S.C. § 1952

§ 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 USCS § 802(b)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

## 21 U.S.C. § 841

§ 841. *Prohibited acts A*

(a) *Unlawful acts.* Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) *Penalties.* Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall

be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraps (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 404 [21 USCS § 844 (a), (b)].

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2) [21 USCS § 830(c)(2)]) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) *Special parole term.* A special parole term imposed under this section or section 405 [21 USCS § 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS § 845] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) *Piperidine offenses and penalty.* Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

§ 843. *Prohibited acts C*

(a) *Unlawful acts.* It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 308 of this title [21 USCS § 828];

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this title or title III, or (B) to present false or fraudulent identification where the person is receiving or purchasing piperidine and the person is required to present identification under section 310(a) [21 USCS § 830(a)]; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) *Communication facility.* It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) *Penalties.* Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

### § 846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

### § 848. *Continuing criminal enterprise*

(a) *Penalties; forfeitures.* (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) *"Continuing criminal enterprise" defined.* For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

> (1) he violates any provision of this title or title III the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this title or title III—
>
> > (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources.

(c) *Suspension of sentence and probation prohibited.* In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 of the United States Code and the Act of July 15, 1932 (D. C. Code, secs. 24-203-24-207), shall not apply.

(d) *Jurisdiction of courts.* The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

### § 952. *Importation of controlled substances*

(a) *Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions.* It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 [21 USCS § 823],

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

(b) *Nonnarcotic controlled substances in schedule III, IV, or V.* It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

(c) *Coca leaves.* In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a), the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

§ 960. *Prohibited acts A*

(a) *Unlawful acts.* Any person who—

(1) contrary to section 1002, 1003, or 1007 [21 USCS §§ 952, 953, 957], knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 1005 [21 USCS § 955], knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 1009 [21 USCS § 959], manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b).

(b) *Penalties.* (1) In the case of a violation under subsection (a) with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

(c) *Special parole term.* A special parole term imposed under this section or section 1012 [21 USCS § 962] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 1012 [21 USCS §962] is in addition to, and not in lieu of, any other parole provided for by law.

§ 963. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

# JOINT
# APPENDIX

FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

(4)

No. 83-1842

In The
# Supreme Court of the United States
October Term, 1984

JONATHAN GARRETT,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## JOINT APPENDIX

PHILIP A. DeMASSA
RICHARD M. BARNETT
2150 First Avenue
San Diego, CA 92101
(619) 236-0897
*Counsel for Petitioner*

JOEL GERSHOWITZ, ESQ.
Department of Justice
Washington, D.C. 20530
(202) 633-3746
*Counsel for Respondent*

PETITION FOR CERTIORARI FILED MAY 11, 1984.
CERTIORARI GRANTED OCTOBER 1, 1984.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

100pp

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## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF WASHINGTON

### RELEVANT DOCKET ENTRIES

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1981 | |
| MARCH 17 | INDICTMENT (Doc: 1) |
| APRIL 6 | ENT (PKS) ARRAIGNMENT AND BAIL REVIEW:AUSA Diskin, def cnsl Marger and Moynihan (local), deft present in custody (deft Garrett). Deft entered PLEA of NOT GUILTY to CTS I, II, III & IV. Trial scheduled 5/18/81; PTM due 4/22/81. Bail reduced to $100,000 c/cs. Court will consider 10% provision if balance secured to court's satisfaction. Deft must remain in U.S. and be placed under pretrial services supervision. Deft remanded. |
| APRIL 16 | MOTION for deft GARRETT, for bill of particulars (Doc: 26) |
| APRIL 21 | MOTION deft GARRETT, to compel consolidation of charges and brief in support thereof (Doc: 46) |
| APRIL 28 | RESPONSE govt's, response to defts' pretrial mtns (Doc: 66) |
| MAY 18 | ENT (BJR) CHANGE OF PLEA FOR DEFT GARRETT: AUSA Diskin, def cnsl Barr, CR Roth, deft present at liberty. Deft enters PLEA of GUILTY. Court questions deft regarding plea and accepts same. Court orders case as to deft referred to USPO for pre-sentence investigation and J&S set for 8-21-81, 9 AM, WTM. Deft to remain at liberty on bond w/modification that deft shall report to USPO by phone on 2nd and 4th Fridays of each month. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| AUGUST 20 | Ent. (WTM) SENTENCE - Ct III - Jonathan Garrett<br>Ct. Rtpr: Keith White<br>AUSA Diskin, Dft cnsl DeMassa<br>Dft pres. w/ cnsl<br>*Hearing had* on appl. of deft to set aside G. Plea.<br>witnesses sworn, exbts marked and adm.<br>Court DENIES mtn to w/draw G. Plea.<br>Court orders transcript & deft's affidavit sealed.<br>*Sentence:*<br>— — — — — — — — —<br>Impr. 5 yrs.<br>Fine - $15,000<br>SPT 5 yrs.<br>— — — — — — — — — —<br>Court orders remaining cts dism.<br>Dft waives removal hring<br>dft remanded. |
| AUGUST 24 | JUDGMENT & COMMITTMENT deft GARRETT (Doc: 128) |

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

RELEVANT DOCKET ENTRIES

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1981 | |
| JULY 16 | 12-ct INDICTMENT (Doc: 1) |
| SEPT 23 | deft's MO TO DISMISS & MEMO ref (Doc: 117)<br>MO FOR BILL OF PARTICS & MEMO (Doc: 121) |
| SEPT 25 | gvt's RESP TO J. GARRETT"S (sic) MO FOR BILL OF PARTICS & MEMO (Doc: 126)<br>" RESP TO J. GARRETT"S (sic) MO TO DISMISS FOR DOUBLE JEOPARDY ref (Doc: 131) |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| OCT 7 | ORDER (LCH) finding J. Garrett's mo re double jeopardy frivolous; trial to be as scheduled cc: Komarek, AUSA (Doc: 138) |
| OCT 15 | TRANSCRIPT OF HRG ON MOTIONS held 9/2/81 (sic) (Doc: 149) |
| OCT 30 | FILED COURT'S INSTRUCTIONS TO THE JURY (Doc: 178)<br>Filed JURY VERDICT (Doc: 179) |
| NOV 30 | JUDGMENT AND PROBATION/ COMMITMENT ORDER (Doc: 197) |
| DEC 3 | NOTICE OF APPEAL cc: ECCA, AUSA (Doc: 202) |
| 1982 | |
| APRIL 12 | TRANSCRIPTS OF JURY TRIAL 8 volumes plus sealed hrgs (Doc: 220) |

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR81-062M

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN,
Defendant.

## INDICTMENT

The Grant Jury charges that:

### COUNT I

Beginning at a time unknown, but on or about September 1979 and continuing through on or about August

27, 1980, within the Western District of Washington and elsewhere, ROBERT GORMAN, RON DePOE, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, Jonathan Garrett, named in this Count as a coconspirator but not as a defendant, and others known and unknown to the Grand Jury, knowingly did conspire to violate Title 21, United States Code, Section 952 by importing into the United States from a place outside thereof, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

## OVERT ACTS

In furtherance of the conspiracy to import marijuana, the following overt acts, among others, were committed within the Western District of Washington and elsewhere.

1. In September 1979, Jonathan Garrett and others rented a house at 3013 - 108th Avenue, S.E., Bellevue, Washington.

2. On October 24, 1979, Jonathan Garrett traveled from Bellevue, Washington to Seattle-Tacoma International Airport where he met Joseph Knowles and ROBERT GORMAN.

3. On or about October 25, 1979, Jonathan Garrett and ROBERT GORMAN solicited Joseph Knowles to participate in the importation of a quantity of marijuana into the United States.

4. In March 1980, Jonathan Garrett met with Luke Markishtum and RON DePOE.

5. On or about August 23, 1980, Jonathan Garrett rented two rooms at the Red Lion Inn, Port Angeles, Washington.

6. On or about August 23, 1980, Jonathan Garrett, and others on behalf of Jonathan Garrett, solicited Luke Markishtum to assist in the importation of a quantity of marijuana into the United States.

7. On or about August 24, 1980, Jonathan Garrett rented two rooms at Morton's Resort, Neah Bay, Washington.

8. On or about August 25, 1980, Jonathan Garrett, RON DePOE, Luke Markishtum, Stan Markishtum, and others visited the Sooes River on the Makah Indian Reservation, Neah Bay, Washington.

9. On or about August 25, 1980, Stan Markishtum and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, camped near the Sooes River.

10. On or about August 26, 1980, Jonathan Garrett, using the name William Medlyn, rented a U-Haul vehicle in Lakewood, Washington.

11. On or about August 26, 1980, Jonathan Garrett, using the name William Adam Medlyn, rented a Jartran truck in Lakewood, Washington.

12. On or about August 26, 1980, RON DePOE and Luke Markishtum each utilized their fishing vessels to transport quantities of marijuana from a "mother ship" to an area on the Makah Indian Reservation, Neah Bay, Washington.

13. On or about August 26, 1980, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, assisted others in unloading a quantity of marijuana from the DePOE and Markishtum fishing vessels into a U-Haul truck.

14. On or about August 26, 1980, Jonathan Garrett, RON DePOE, MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, and others possessed a quantity of marijuana.

15. During October 1980, Jonathan Garrett met Luke Markishtum in Los Angeles, California and paid him Forty Thousand Dollars ($40,000.00).

All in violation of Title 21, United States Code, Section 963.

## COUNT II

On or about October 24, 1979, JONATHAN GARRETT and ROBERT GORMAN did cause Joseph Knowles to travel in interstate commerce from Panama City, Florida to Bellevue, Washington, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being the importation of marijuana in violation of Title 21, United States Code, Sections 952, 960(a)(1) and 960(b)(2), and JONATHAN GARRETT and ROBERT GORMAN did thereafter perform and attempt to perform acts to promote, manage, establish and carry on and facilitate the promotion, management and carrying on of said unlawful activity by importing a quantity of marijuana.

All in violation of Title 18, United States Code, Section 1952(a)(3) and 2.

## COUNT III

On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did import, and aid and abet the importation, into the United States from a place outside thereof, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 952, 960(a)(1) and 960(b)(2) and Title 18, United States Code, Section 2.

## COUNT IV

On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did possess, and aid and abet the possession, with intent to distribute a controlled substance, that is, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B) and Title 18, United States Code, Section 2.

A TRUE BILL:

DATED: March 17, 1981

/s/ A. SPENCER REEVES
FOREPERSON

/s/ JOHN C. MERKEL
United States Attorney

/s/ FRANCIS J. DISKIN
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

CRIMINAL NO. 81 62M

UNITED STATES OF AMERICA

vs.

JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN,

Defendants.

## MOTION FOR BILL OF PARTICULARS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JONATHAN GARRETT, a Defendant herein, by and through his undersigned attorneys, and pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, hereby moves this Court to enter an Order directing the United States of America to file a Bill of Particulars as to the following matters concerning the offenses charged in the Indictment herein:

### PARTICULARS

1.

As used in this Motion, the terms "Co-conspirator" or "Co-defendant", wherever they may appear, include all alleged Co-conspirators and Co-defendants, both those indicted as well as those not indicted.

2.

With respect to those allegations contained in Count II of the Indictment, state:

(a) The exact manner in which Jonathan Garrett managed, established, carried on or facilitated an unlawful activity;

(b) The precise time of day, place and location where each act of management, establishment or facilitation of said activity is alleged to have been performed;

(c) The names of all persons, presently known to the Government, and their addresses at the time of their alleged participation in the alleged unlawful activity, as set forth in Count II of the Indictment;

(d) The quantity of marijuana alleged as being unlawfully importated in Count II.

3.

(a) The names of all Co-conspirators, presently known to the Government, and their addresses at the time of their alleged participation in the alleged conspiracies set out in Counts I and II of the Indictment herein;

(b) Any overt acts not enumerated in Counts II, III, and IV of the Indictment, concerning which acts the Government intends to offer evidence upon the trial of the Indictment herein;

(c) Any act done or caused to be done by Jonathan Garrett constituting the aiding and abetting alleged in Counts III and IV of the Indictment, which the prosecution contends was done in furtherance of the offenses alleged in said Count;

(d) The precise time of day, place and location where each of the overt acts of Jonathan Garrett in aiding and abetting alleged in Counts III and IV of the Indictment are alleged to have been performed;

(e) The particular acts of Jonathan Garrett alleged in Counts III and IV of the Indictment, which Jonathan Garrett is alleged to have personally performed;

(f) The particular manner in which Jonathan Garrett is alleged to have aided, abetted, counseled, commanded, induced, procured or wilfully caused the illegal importation into the United States of a controlled substance by Co-defendants Robert Gorman, Ron DePoe and Michael Johnson, a/k/a Michael Minikin as alleged in Count III of the Indictment herein, and in particular, state the nature of the acts by which it is claimed Jonathan Garrett aided and abetted the Co-defendants named hereinabove in this sub-paragraph in committing said offense and the places where such acts occurred and the dates of each such act;

(g) The particular manner in which Jonathan Garrett is alleged to have illegally possessed with intent to distribute a controlled substance as alleged in Count IV of the Indictment herein, and in particular, state the nature of the acts by which it is claimed that Jonathan Garrett illegally possessed with intent to distribute a controlled substance and the places where such acts occurred and the dates of each such act;

(h) The names of any persons present at or who participated in the commission of the offense alleged in Count III of the Indictment, to wit: importation of a controlled substance in violation of 21 U.S.C. § 812, 21 U.S.C. §§ 952, 960(a)(1) and 960(b)(2), and 18 U.S.C. § 2;

(i) The names of any persons present at or who participated in the commission of the offense alleged in Count IV of the Indictment, to wit: unlawful possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 812, and 18 U.S.C. § 2;

(j) The name of the individual from whom Jonathan Garrett, or any of the Co-defendants, allegedly received the controlled substance made the bases for the offenses alleged in Counts I, II, III and IV of the Indictment herein.

4.

With respect to those allegations contained in Count III of the Indictment reading as follows:

> "On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did import, and aid and abet the importation, into the United States from a place outside thereof, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.",

(a) State what the period was of said alleged conspiracy and when said conspiracy began with regard to Jonathan Garrett;

(b) State the names of any alleged Co-conspirators or Co-defendants who on previous occasions acquired a quantity of marijuana outside the customs territory of the United States;

(c) State the names of any alleged Co-conspirators or Co-defendants who on previous occasions illegally imported marijuana into the customs territory of the United States;

(d) State the names of the Co-conspirators or Co-defendants alleged to have previously rendezvoused in any of the locations specified in Count III of the Indictment;

(e) State the dates when Co-conspirators or Co-defendants allegedly acquired marijuana outside the customs territory of the United States;

(f) State the date or dates when alleged Co-conspirators or Co-defendants illegally imported marijuana into the customs territory of the United States;

(g) State the date or dates of any previous rendezvous with alleged Co-conspirators or Co-defendants in any of the locations specified in Count III of the Indictment;

(h) State the particular manner in which Jonathan Garrett participated in the offense alleged in Count III of the Indictment, to wit: importation of marijuana, and including but not limited to, the particular manner in which Jonathan Garrett committed any overt acts alleged to have occurred in furtherance of the aforesaid offense alleged in Count III of the Indictment, which overt acts form the gravamen of the offense.

5.

With respect to the allegations contained in Count IV of the Indictment, reading as follows:

> "On or about August 26, 1980, at Neah Bay, within the Western District of Washington, JONATHAN GARRETT, ROBERT GORMAN, RON DePOE, and MICHAEL JOHNSON, a/k/a MICHAEL MINIKIN, knowingly and intentionally did possess, and aid and abet the possession, with intent to distribute a controlled substance, that is, approximately twelve thousand (12,000) pounds of marijuana, a substance controlled under Schedule I, Title 21, United States Code, Section 812.",

(a) State what the period was of said alleged conspiracy and when said conspiracy began with regard to Jonathan Garrett;

(b) State when the said alleged conspiracy ended with regard to Jonathan Garrett;

(c) State the names of all those Co-conspirators, including but not limited to Jonathan Garrett, who conspired to unlawfully possess marijuana at any specified time or times before, during or after the possession alleged in Count IV;

(d) State the date or dates of any previous rendezvous between one or more of the named Defendants;

(e) State the particular manner in which Jonathan Garrett participated in the offense alleged, to wit: to unlawfully possess marijuana.

## CITATION OF AUTHORITIES

6.

This Motion is not an attack on the sufficiency of the Indictment. The fact that the Indictment is valid is not a defense to a Motion for a Bill of Particulars, *United States v. Faulkner*, 53 F.R.D. 299, 310 (Wis. 1971), since the undelying purposes of Rule 7(f) of the Federal Rules of Criminal Procedure is not to cure defects in the Government's pleading, but rather to furnish the Defendant *further information* respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial. *United States v. Bearden*, 423 F.2d 805, 809 (5th Cir. 1970); *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965); *Pipkin v. United States*, 243 F.2d 491 (5th Cir. 1957); and *United States v. Smith*, 16 F.R.D. 372, 375 (W.D. Mo. 1954). Further, where the information sought is necessary to the preparation of a defense or to prevent surprise, then the ". . . accused is entitled to this 'as of right'" regardless of whether such disclosure would be privileged or otherwise. *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954); Wright, *Federal Practice and Procedure* § 129, at pp. 282-283. *See also, United States v. United States Gypsum*, 37 F.Supp. 398, 402 (D.D.C. 1941); and *Singer v. United States*, 58 F.2d 74 (3rd Cir. 1932).

7.

The names of all Co-conspirators requested in Paragraphs 2, 3, 4 and 5 of this Motion, who are not named in the Indictment, but are known to the prosecution, should be provided by the Government by Bill of Particulars. *United States v. Burgio*, 279 F.Supp. 843, 846 (S.D. N.Y. 1968); *United States v. Tanner*, 279 F.Supp. 457, 475 (N.D. Ill. 1967); *United States v. Pilnick*, 267 F.Supp. 791, 801 (S.D. N.Y. 1967); and *United States v. Baker*, 262 F.Supp. 657, 675 (D.D.C. 1966).

8.

The overt acts requested in Paragraphs 3 and 4 of this Motion which are not specified in the Indictment but which the Government contends were committed in the furtherance of the alleged conspiracy and/or aiding and abetting, and upon which the Government may rely at trial, should be provided by the Government by Bill of Particulars. *United States v. Leach*, 427 F.2d 1107, 1110 (1st Cir. 1970), *cert. denied*, 406 U.S. 829; *United States v. Tanner*, 279 F.Supp. 457, 478 (N.D. Ill. 1967); *United States v. Pilnick*, 267 F.Supp. 791, 801 (S.D. N.Y. 1967); *United States v. Baker*, 262 F.Supp. 657, 675 (D.D.C. 1966).

9.

The precise time of day, place and location where the overt acts of the alleged conspiracies, and/or aiding and abetting, were committed which are requested in Paragraphs 2 & 3 of this Motion should be produced by the Government by Bill of Particulars since Jonathan Garrett is entitled to be apprised of the precise time of day and place within a city or other area in which an offense is alleged to have occurred, *United States v. Burgio*, 279 F.Supp. 843, 846 (S.D. N.Y. 1968); *United States v. Lubomski*, 277 F.Supp. 713 (N.D. Ill. 1967); *United States v. Dean*, 266 F.Supp. 159 (S.D. N.Y. 1966); *United States v. Giramonti*, 26 F.R.D. 168 (D. Conn. 1960); *United States v. Wilson*, 20 F.R.D. 569 (S.D. N.Y. 1957); *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954); as well as the time and place where each overt act of a conspiracy is alleged to have been performed. *United States v. Tanner*, 279 F.Supp. 457, 475 (N.D. Ill. 1967); *United States v. Crisona*, 271 F.Supp. 150, 156 (S.D. N.Y. 1967).

10.

The particular acts alleged to have been personally performed by Jonathan Garrett requested in Paragraphs 2, 3, and 4 of this Motion should be provided by the Government by a Bill of Particulars. *United States v. Tanner*, 279 F.Supp. 457, 474-476 (N.D. Ill. 1967).

11.

The time, date, place and manner in which Jonathan Garrett is alleged to have become a member of the charged conspiracies or commenced aiding and abetting requested in Paragraphs 2 & 3 of this Motion should be provided by the Government by a Bill of Particulars. *United States v. Tanner*, 279 F.Supp. 457, 474 (N.D. Ill. 1967).

12.

The manner in which Jonathan Garrett is alleged to have aided, abetted, counseled, commanded, induced, procured or caused the commission of the offenses requested in Paragraph 3 of this Motion, including the dates, places and nature of the acts by which it is claimed that Jonathan Garrett accomplished same, should be provided by the Government by Bill of Particulars. *United States v.*

*Baker*, 262 F.Supp. 657, 674 (D.D.C. 1967). *See also, United States v. Tucker*, 473 F.2d 1290 (6th Cir. 1973); *United States v. Bel-Mar Laboratories*, 284 F.Supp. 875, 888 (E.D. N.Y. 1968); *United States v. Burgio*, 279 F.Supp. 843 (S.D. N.Y. 1968).

### 13.

The names of any persons present at or who participated in the commission of the offense requested in Paragraphs 2 & 3 of this Motion should be provided by the Government by Bill of Particulars. *United States v. Rimanich*, 422 F.2d 817 (7th Cir. 1970); *United States v. Cummings*, 49 F.R.D. 160 (S.D. N.Y. 1969); *United States v. Tanner*, 279 F.Supp. 457 (N.D. Ill. 1967); *United States v. Acarino*, 270 F.Supp. 526 (E.D. N.Y. 1967); *United States v. Pilnick*, 267 F.Supp. 791 (S.D. N.Y. 1967); *United States v. Tucker*; 262 F.Supp. 305, 307 (S.D. N.Y. 1966); *United States v. Willis*, 33 F.R.D. 510 (S.D. N.Y. 1963); *United States v. Covelli*, 210 F.Supp. 589 (N.D. Ill. 1962).

### 14.

The name of the individual or individuals from whom Jonathan Garrett or any Co-defendants allegedly received the controlled substance requested in Paragraphs 2, 3 and 4 of this Motion should be provided by the Government by Bill of Particulars. *United States v. Acarino*, 270 F.Supp. 526 (E.D. N.Y. 1967); *United States v. Rosenfeld*, 264 F.Supp. 760 (N.D. Ill. 1967); *United States v. Vasquez*, 25 F.R.D. 350 (S.D. N.Y. 1958), *cert. denied*, 365 U.S. 887; *United States v. Wilson*, 20 F.R.D. 569 (S.D. N.Y. 1957); *United States v. Smith*, 16 F.R.D. 372 (W.W. Mo. 1954).

### 15.

With regard to the particulars requested in Paragraphs 2, 3 and 4 of this Motion relating to the alleged conspiracies, or aiding and abetting, it is imperative that the Government provide Jonathan Garrett with the precise period of said alleged conspiracies or illegal activities, as well as when said conspiracies or illegal activities began, in order to determine whether or not certain acts or conduct fall within the applicable statute of limitations and to adequately prepare defenses thereto; to be provided with particulars as to the names of alleged co-conspirators who personally committed the various acts alleged therein in order to adequately prepare a defense thereto, *United States v. Tanner*, 279 F.Supp. 457, 474-476 (N.D. Ill. 1967); and to determine the dates when any of these acts in furtherance of the alleged conspiracies took place. *United States v. Dean*, 266 F.Supp. 159 (S.D. N.Y. 1966); *United States v. Giramonti*, 26 F.R.D. 168 (D. Conn. 1960); *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

> "Without definite specification of the time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may well be difficulty in preparing to meet the general charges of the information, and some danger of surprise." *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

## SUMMARY AND CONCLUSIONS

### 16.

This Motion is not interposed for delay, but rather the matters and particulars hereinabove requested are essential to enable Jonathan Garrett to adequately be apprised of the nature and scope of the accusations against him, as guaranteed by the Sixth Amendment to the Constitution of the United States, to have an opportunity to adequately prepare his defense, to avoid prejudicial surprise at trial, to clarify the issues herein and avoid confusion and delay at trial, and to enable him to be protected against a second prosecution for the same offense and plead double jeopardy thereto as guaranteed by the Fifth Amendment to the Constitution of the United States.

17.

The particulars requested herein are within the knowledge and control of the Government and its agents, and cannot be obtained by Jonathan Garrett other than by Order of this Court. The particulars requested herein are not privileged and compliance poses no undue burden on the Government.

WHEREFORE, premises considered, and for such other reasons as may appear to this Court at hearing, Jonathan Garrett prays as follows:

(a) That a hearing be held in the matter of this Motion as soon as practicable, but in any event, sufficiently in advance of trial to enable him to obtain the particulars ordered by the Court and to use them to prepare necessary pretrial motions and trial defenses;

(b) That the Court order the Government to furnish a Bill of Particulars as requested in this Motion;

(c) That as to any items in the Motion concerning which the Government shall state in its Bill of Particulars that its knowledge or information is incomplete, the Government shall set forth in its Bill of Particulars whatever information and knowledge it may have and shall furnish particulars upon obtaining further knowledge or information prior to trial;

(d) That Jonathan Garrett be allowed to supplement and amend this Motion as may be necessary based on further discovery as provided by the Government or as may be ordered by the Court, for which he cannot now be aware of or plan for; and

(e) That he be awarded such other and further relief as this Honorable Court deems just and proper.

This —— of April, 1981.

Respectfully submitted,

LAW OFFICES OF EDWIN MARGER

By: Edwin Marger
/s/ Edwin Marger

By: Nancy L. Finkel
/s/ Nancy L. Finkel
6666 Powers Ferry Road, Suite 320
Atlanta, Georgia 30339
404-955-1010

BERGMAN, BAUER & FRIESE

By: ____________________
/s/ James P. Moynihan
Of Counsel
247 Fourth & Blanchard Bldg.
Seattle, WA 98121
206-447-9747

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Bill of Particulars has been furnished to Francis J. Diskin, U.S. Attorney, 10th Floor, U.S. Courthouse, Seattle, Washington 98104, by hand delivery, this ____ day of ______________, 1981.

______________________

James P. Moynihan

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

NO. CR 81 62M

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JONATHAN GARRETT, ROBERT GORMAN,
RON DePOE, and MICHAEL JOHNSON, a/k/a
MICHAEL MINIKIN,

Defendants.

## MOTION TO COMPEL CONSOLIDATION OF CHARGES AND BRIEF IN SUPPORT THEREOF

COMES NOW the Defendant, JONATHAN GARRETT, and requests that this Court order the United States Attorney to bring all charges anticipated, investigated and currently pending against the Defendant in this Honorable Court, the United States District Court, Western District of Washington at Seattle. In support of his motion, the Defendant would show as follows:

1.

The Defendant has been indicted in a four count indictment returned on March 17, 1981.

2.

Count I of said Indictment, Criminal No. 81-62M, alleges a conspiracy between Robert Gorman, Ron DePoe, Michael Johnson, and JONATHAN GARRETT. The Defendant is named as a co-conspirator but not a defendant in Count I. JONATHAN GARRETT is named in twelve of the fifteen overt acts alleged in Count I. The basis of Count I is a certain alleged importation of 12,000 pounds of marijuana.

3.

Count II of said Indictment involves the facilitation of an unlawful activity, the importation of marijuana.

4.

Count III of said Indictment involves the same named defendants and constitutes the substantive offense of knowing and intentional importation and/or aiding and abetting importation of marijuana.

5.

Count IV of said Indictment involves possession and/or the aiding and abetting of possession of the same 12,000 pounds of marijuana.

6.

In the statements made during the arraignment and bond hearing of the instant case, the United States Attorney candidly admitted that he had originally intended to further prosecute the Defendant, JONATHAN GARGETT, under 21 U.S.C. § 848, Continuing Criminal Enterprise. The Assistant United States Attorney, Francis J. Diskin, stated that his directives from the Justice Department were to omit any indictment under the Continuing Criminal Enterprise provisions and further, to limit the indictment of this Defendant to substantive acts and aiding and abetting, avoiding any terminology of conspiracy.

7.

The Defendant has information and believes that the purpose for the directive by the Department of Justice to the United States Attorney to proceed as outlined in paragraph 6 above was three-fold: (1) to manipulate the language of the indictment using the terminology "aiding and abetting" in lieu of "conspiracy" in order to evade the double jeopardy provisions of the United States Constitution; (2) to usurp the judicial function by manipulating the venue of the charges against the Defendant in order to obtain a trial on a Criminal Enterprise count in a jurisdiction where decisions have been most favorable to the prosecution; and (3) to enhance any subsequent sentence the Defendant might receive.

8.

It has been stated on the record by the Assistant United States Attorney that it is anticipated and expected that JONATHAN GARRETT will be indicted in some location within the State of Florida under the jurisdiction of the Fifth Circuit Court of Appeals for the offense outlined in 21 U.S.C. § 848.

9.

The evidence, testimony, and proof which will be required under the four count indictment presently before this Honorable Court is the same evidence which will be elicited in an attempt to prove any allegations of a Continuing Criminal Enterprise indictment.

10.

Judicial officers in the Western District of Washington have already taken into account allegations of continuing criminal enterprise. In setting bond in this case, and in a bond reduction hearing, the United States Magistrate and the United States District Court both indicated that bond had been set in this case based on the United States Attorney's representation that there was evidence of a Continuing Criminal Enterprise. The knowledge by the United States Attorney for the Western District of Washington at Seattle of the elements required for Continuing Criminal Enterprise allows for determination by this Court that any such charge against JONATHAN GARRETT should be tried within the Western District of Washington.

11.

To allow two separate prosecutions based on the same facts, those being the instant indictment, Criminal No. 81-62M, in the Western District of Seattle, and some other indictment in the State of Florida, would create great injustice, expense, and inconvenience to this Defendant. The Defendant would also be subject to the enhanced penalty provision of 21 U.S.C. § 848(a) (2).

## ARGUMENT

This Defendant has been made aware by the Assistant United States Attorney, Francis J. Diskin, that he had previously been prepared to try the Defendant, JONATHAN GARRETT, for all four counts of the instant indictment as well as for violations of 21 U.S.C. § 848, Continuing Criminal Enterprise. The Assistant United States Attorney indicated that the Department of Justice had instructed him not to seek an indictment under that statute or on conspiracy against this Defendant due to their

intention to prosecute him in a District Court within the Fifth Circuit Court of Appeals jurisdiction.

A. JONATHAN GARRETT should be allowed to defend the instant indictment and any charges under 21 U.S.C. § 848 during the same trial.

In actuality, Continuing Criminal Enterprise, as might be alleged against this Defendant, would constitute an ongoing conspiracy to violate the controlled substances act. It is this very allegation that is the sum and substance of the instant indictment. 21 U.S.C. § 848 (b) defines a continuing criminal enterprise as follows:

> "(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) He violates any provisions of this subchapter or subchapter (ii) of this chapter, the punishment for which is a felony, and
>
> (2) Such violation is a part of a continuing series of violations of this subchapter or subchapter (ii) of this chapter—
>
> (A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) From which such person obtains substantial income or resources."

The United States Attorney has expressed an intention on the part of the Department of Justice to try JONATHAN GARRETT under this statute with the underlying offense being importation of marijuana. Upon information and belief, Defendant suggests that the "Continuing

Criminal Enterprise", alleged in any other indictment, would only constitute a single conspiracy. The allegations of Criminal Indictment 81-62M, while phrased in language of aiding and abetting, consist of a conspiracy. A single conspiracy may exist, although the one "agreement" contemplates several offenses by a multiplicity of means. *United States v. Kelly,* 349 F.2d 720, 755 (2nd Cir. 1965), *cert. denied,* 384 U.S. 947 (1966); *United States v. Crosby,* 294 F.2d 928, 945 (2nd Cir. 1961).

The Federal Rules of Criminal Procedure appreciate a defendant's right to a fair trial. FED. R. CRIM. P. 21(b) permits the District Court, on the defendant's motion, to transfer a case to another district "in the interest of justice". *United States v. Cashin,* 281 F.2d 669 (2nd Cir. 1960). On the Defendant's motion, the Court should take into consideration the hardship and inconvenience to the prospective witnesses, the Defendant, and the estimated costs of producing the required evidence. *United States v. Pellier,* 19 F.R.D. 164, 167-68 (E.D. N.Y. 1956), *affirmed,* 255 F.2d 441, *cert. denied,* 358 U.S. 821 (1958). In applying that standard to the instant case, there is a clear financial hardship on the Defendant of having to defend in two separate courts. This is intolerable when the charges are similar and interrelated.

For example, the legal fees and actual expenditures for defense attorneys to defend two separate criminal cases could be excessive and beyond the means of the Defendant. Moreover, the witnesses who would be brought to testify in the Western District of Washington could also be required to appear in the State of Florida or any other location where a Continuing Criminal Enterprise trial may be had. The Government would be expending excessive amounts of money in trying the cases in two jurisdictions. In addition to the financial burden and hardship placed on the Defendant by dual prosecution, the United States Government, through the Department of Justice, is attempting to deny this Defendant his right to speedy trial.

The speedy trial provisions are applicable to the indictment handed down on March 17, 1981. It is clear that the United States Attorney had anticipated trying JONATHAN GARRETT for a continuing criminal enterprise. He has the evidence available, and should be required to proceed on any charges under 21 U.S.C. 848. The United States Attorney did not indict the Defendant on these charges, but instead, impermissibly used the information obtained under that investigation to deny the Defendant other rights (for example, a low bond).

The Department of Justice has denied the Defendant his rights under the Sixth Amendment of the United States Constitution and the Statutes of the United States to receive a fair and speedy trial on allegations against him. By declining to immediately prosecute the Defendant on these charges, the United States Government has manipulated the indictment process to violate this Defendant's rights. By failing to indict this Defendant on the charges of Continuing Criminal Enterprise, and yet introducing evidence and argument before this Honorable Court concerning this Defendant's involvement in that crime, the Government has placed the Defendant in the same position with regard to the Continuing Criminal Enterprise as he is in regard to the charges of the indictment. Bond has been set with an eye toward violations of 21 U.S.C. § 848 [See findings and statements of United States Magistrate]. The Government, however, by failing to formally indict the Defendant on this charge, attempts to evade the provisions of the speedy trial act and other rights of the Defendant.

Finally, the purpose of the Government to have this Defendant first tried in Washington and later tried in another district is to attempt to have JONATHAN GARRETT sentenced in any subsequent prosecution under provisions (a) (1) of 21 U.S.C. § 848. Subsection (a) (1) of 21 U.S.C. § 848 reads as follows:

> "Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this Section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2)."

By trying the Defendant in two separate jurisdictions and manipulating the order of trial, i.e., having these substantive counts tried first, the Department of Justice attempts to deny the Defendant the provisions of (a) (1) and subjects him to an increased minimum sentence of 20 years and $200,000 fine instead of the 10 year minimum and $100,000 fine mandated by 21 U.S.C. § 848(a) (1).

B. Prosecutoral misconduct must be avoided by requiring a consolidation of charges.

Federal Rules of Criminal Procedure Rule 8(a) provides for joinder of offenses. Under FED. R. CRIM. P. 8 the offenses outlined in Indictment CR 81-62M and a

charge under 21 U.S.C. 848 could be joined together for trial in this jurisdiction. Even if the Government were to indict the Defendant under a separate indictment, the Federal Rules provide for a joint trial of those indictments. Federal Rules of Criminal Procedure 13 reads as follows:

> "Trial together of Indictments or Informations. The Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information."

Therefore, there is no obstruction in the Federal Rules of Criminal Procedure to trying these charges together. The Western District of Washington should be the appropriate venue for any charge under 21 U.S.C. 848. While there may be multiple jurisdictions having venue under 21 U.S.C. § 848, FED. R. CIV. P. 18 should be interpreted to require the venue of any said charge or indictment in this jurisdiction. FED. R. CRIM. P. 18 contains the following language:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the district in which the offense was committed. *The Court shall fix a place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.*"

Both the convenience of the Defendant and the prompt administration of justice require that any further charges surrounding the importation of marijuana by JONATHAN GARRETT, whether they be alleged as conspiracies, continuing criminal enterprises, or otherwise, presently known and adequately investigated by the Government, should be tried simultaneously with the instant indictment in the Western District of Washington. To fail to follow this procedure violates the Defendant's constitutional right to a fair and speedy trial as well as the statutory provisions of the Federal Rules of Criminal Procedure.

The right of a District Court to compel a prosecution within a given jurisdiction is implicit in a reading of the Federal Rules of Criminal Procedure. For example, FED. R. CRIM. P. 21(b) allows the District Court to transfer cases between jurisdictions.

> "For the convenience of the parties and witnesses, and in the interest of justice, the Court, upon motion of the defendant, may transfer the proceedings as to him or any one or more of the counts thereof, to another district."

The most important feature of the FED. R. CRIM. P. 21 is the effect of the provision on what had previously been the law. The notes of the Advisory Committee on the Rules are as follows:

> "The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the Court." FED. R. CRIM. P. 21—Notes of Advisory Committee, n.2.

The purpose of Rule 21 was to remove the discretion of the Government and Executive Branch and place it with the judiciary in determining the location of trial of given cases and charges.

The purpose behind the Department of Justice's decision to prosecute JONATHAN GARRETT in another jurisdiction for the offense of Continuing Criminal Enterprise is to place the Government in a jurisdiction most favorable to prosecutions of this type. This manipulation by the Executive Branch does disservice to the judiciary, to this Honorable Court, and to the Eighth Circuit Court of Appeals. The Government should not be allowed to forum-shop, a practice which has been discredited as infringing both upon the Constitution and the integrity of the judiciary.

## CONCLUSION

WHEREFORE, Defendant respectfully requests as follows:

(1) That a hearing be held on this matter;

(2) That the Government be compelled to disclose whether it intends to indict the Defendant on charges under 21 U.S.C. 848 in any jurisdiction save the Western District of Washington;

(3) That if the Government intends to indict this Defendant under those charges within this district, the Court order the United States Attorney to try that charge simultaneously with the charges of the instant indictment;

(4) That if the Government indicates an intention to indict the Defendant for violations of 21 U.S.C. 848 in any other jurisdiction, the Government be required to give written reasons and justifications for evading the jurisdiction of this Court:

(5) For such other and further relief as this Court may deem just and proper.

Respectfully submitted,
LAW OFFICES OF EDWIN MARGER

By: ______________________________
Edwin Marger

By: /s/ Nancy L. Finkel
Nancy L. Finkel
6666 Powers Ferry Road
Suite 320
Atlanta, Georgia 30339
(404) 955-1010

Bergman, Bauer & Freise

By: ______________________
James P. Moynihan
2121 Fourth Avenue
Seattle, Washington 90181
(206) 447-9747

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NO. CR81-62M

UNITED STATES OF AMERICA,
Plaintiff,
v.
JONATHAN GARRETT, et al.,
Defendants.

## GOVERNMENT'S RESPONSE TO DEFENDANTS' PRETRIAL MOTIONS

COMES NOW the United States of America, by and through John C. Merkel, United States Attorney for the Western District of Washington, and Francis J. Diskin, Assistant United States Attorney for said District, and responds to the pretrial motions filed in the above-captioned case.

## BACKGROUND FACTS

On or About August 26, 1980, the United ______________ assisted by local authorities at Neah Bay, Washington, discovered a substantial quantity of baled marijuana in the form of "Thai sticks" which had been abandoned on the Neah Bay Indian Reservation near the Sooes River. The agents also discovered, adjacent to a nearby campsite, a U-Haul Truck, with Missouri plates, which had been left along the shoulder of a dirt road. The passenger door of this vehicle was open, the keys were missing and the vehicle was tipped into a ditch at a 45° angle. Treating the vehicle as abandoned, Joe Martin, Chief, Neah Bay Police Department, opened the rear doors of the vehicle and discovered a quantity of shake shingles and more bales of marijuana.

A later investigation revealed that the U-Haul Truck had been rented by an individual using the name of William A. Medlyn. An employee of U-Haul has selected Jonathan Garrett's photo from a photo montage as the individual who used the name William Medlyn in renting said vehicle.

Drug Enforcement Administration (DEA) agents, who were called to the Neah Bay Reservation also discovered a Washington State automobile license plate on a dirt road leading away from the area where the marijuana was located. The plate was registered to a 1979 Ford owned by Avis Rent-A-Car. Said vehicle had been rented on August 23, 1980 by Jonathan Garrett.

Luke Markishtum is expected to testify that he was approached by Jonathan Garrett and Ron DePoe and solicited to assist in the importation of the above-mentioned marijuana. According to Markishtum, the plan included the use of DePoe's boat and one owned by Markishtum to ferry the bales of marijuana from a "mother ship" located on the ocean to the beach area along the Sooes River. Markishtum participated in the venture during the evening of August 26th and the early morning of August 27, 1980 until some of the marijuana bales slipped off a Zodiac craft being pushed into the river by the vessels operated by DePoe and Markishtum.

Stan Markishtum, Luke's son, is also expected to testify and identify Jonathan Garrett, Ron DePoe and Michael Minikin as participants in the importation venture.

Finally, an individual named Joseph Knowles is expected to identify Jonathan Garrett and Robert Gorman as two persons who solicited him to participate in this illegal enterprise as early as October 1979. According to Knowles, he met with Garrett and Gorman in Bellevue, Washington in October 1979 and discussed the importation scheme which culminated in August 1980. Knowles was solicited to captain the mother ship, but his participation was terminated when Garrett and Gorman discovered that he had been cooperating with law enforcement authorities.

## PRETRIAL MOTIONS

### 1. *Early Production of Jencks Material*

The Court is without authority to order the early production of Jencks material. *See* Title 18, United States Code, Section 3500, which provides, in part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

In the instant case, the undersigned will make the Jencks Act material available on the Friday afternoon prior to trial so as to avoid the necessity of interrupting the proceedings after the direct testimony of each Government witness.

### *Disclosure of Special Arrangements*

The undersigned is aware of his responsibilities under both *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). To date, the undersigned is unaware of any evidence which might tend to exculpate any defendant in this case. To date, the undersigned has not entered into any special arrangement or offered any consideration to any prospective witness to induce testimony in the instant case. Now Agreement with Mr. Gorman—Guilty—Count II max. exposure is two years, not further prosecuted in this District or N.D. of Florida.

### *Inspection and Independent Testing*

The undersigned has previously offered to make all the physical and documentary evidence which will be offered in evidence in the case-in-chief available for inspection. Further, on April 22, 1981, the undersigned spoke by telephone with Mr. Ed Marger, attorney for Jonathan Garrett, and offered to make available the core-samples of marijuana for independent testing.

Finally, the undersigned will forward to each counsel, along with this responsive pleading, copies of all DEA 7s and DEA 7as which list the physical evidence and provide a brief synopsis of the person who discovered same and the circumstances surrounding such discovery. Copies of those forms are appended to this response for the Court's review.

### *Retention of Rough Notes and Writings*

The United States is not opposed to said motion and has advised the case agent that such a request has been made.

### *Disclosure of Grand Jury Proceedings and Transcript*

As the Ninth Circuit pointed out in *United States v. Jones*, 612 F.2d 453 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980), Rule 16(a)(2) and (a)(3), Federal Rules of Criminal Procedure, exclude both "statements made by Government witnesses or prospective Government witnesses, except as provided in Title 18, United States Code, Section 3500, and Grand Jury transcripts from the category of evidence, the defense is entitled to discover before trial."

Defendant's reliance on *Brady* is also misplaced because *Brady* does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control. *See United States v. Jones, supra* at 455 and cases cited therein. Accordingly, defendant's request for Grand Jury transcripts must be denied in the absence of any showing of reasonable necessity. *United States v. Richter*, 488 F.2d 170 (9th Cir. 1973).

Defense counsel's conclusory and boilerplate statement that the testimony of certain suspected Grand Jury witnesses is contradictory to the testimony of other such witnesses is unsupported and, in any event, insufficient to establish necessity.

### *Severance*

The United States is opposed to defendant Garrett's motion for severance and said motion should be denied for the following reasons.

Rule 8(b), Federal Rules of Criminal Procedure, governing joinder of defendants, states that:

> Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. . . .

Joinder of the defendants in this Indictment fits squarely within the terms of the Rule. The substantive offenses with which defendant Garrett is charged are included in the series of transactions in furtherance of the conspiracy in which Mr. Garrett is named although not therein indicted.

On the other hand, Rule 14 of the Federal Rules of Criminal Procedure, provides that the Court may grant a severance of defendants or order an election of counts, if it appears that a defendant is prejudiced by the joinder. There is a strong policy against severance, however, where joinder is proper under Rule 8. *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004 (1969), discussed the rationale behind this policy as follows:

> There is substantial public interest in [joint trials]; it expedites the administration of justice, re-

> duces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.

Defendant Garrett has failed to demonstrate how he will be prejudiced by a joint trial. The suggestion that the multiple count indictment or the time, place and circumstances surrounding the arrest of each defendant somehow mandates severance is without merit.

An additional theory of defendant Garrett as to the necessity for severance, appears to be based upon a fear that he will be found guilty by reason of his association with the other defendants. Such vague and speculative concerns do not rise to the level of the manifest prejudice which would require separate trials pursuant to the case law in this Circuit. *United States v. Cozzetti,* 441 F.2d 344, 349 (9th Cir. 1971). Defendant Garrett simply has not articulated any good reason why this Court should deviate from the general rule that defendants charged with jointly committing criminal offenses are to be jointly tried.

Garrett also argues that a joint trial will deprive him of a right to confront and cross-examine codefendants. No such right exists.

The statement that separate trials would "provide the co-Defendants with an opportunity to testify in Defendant's behalf" (Motion for Severance at 2) is also insufficient.

In *United States v. Kaplan,* 554 F.2d 958 (9th Cir. 1977), the Ninth Circuit pointed out that in considering

a motion to sever based upon a defendant's insistence that a codefendant will provide exculpatory testimony, the trial court must weigh *inter alia:*

> The good faith of the defendant's intent to have a co-defendant testify, the possible weight and credibility of the predicted testimony, the probability that such testimony will materialize, the economy of a joint trial, and the possibility that the trial strategy of a co-defendant (a decision to plead guilty, for example) will prejudice the defendant seeking severance.
>
> 554 F.2d at 966.

In the instant case, defendant Garrett has failed to establish any of the criteria mentioned by the Ninth Circuit. There is no affidavit from defendant Garrett expressing a desire for the testimony of any co-defendant. Nor is there any indication that a co-defendant has exculpatory evidence which would be unavailable at a joint trial. For all of the above reasons, the motion for severance should be denied.

### *Motion to Compel Consolidation of Charges*

On information and belief there are presently no other charges pending against defendant Garrett in any other Court of the United States. Accordingly, there are no charges to consolidate.

The decision to charge a defendant with a crime and the jurisdiction where such charge is brought is a matter within the sole discretion of the Executive Branch of the Government. United States Constitution, art. II, section 3. *See also Nader v. Saxbe,* 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

A prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions has been recognized by numerous counts. *See e.g., Oyler v. Boles*, 368 U.S. 448 (1962); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

The motion to compel the United States to charge Mr. Garrett at this time and in this District must be denied; to grant such a motion would violate the separation of powers.

*Admissibility of Coconspirator Statements*

While the factual outline above is only a brief synopsis of the evidence against defendant Garrett, said outline establishes a conspiracy and Garrett's connection thereto. Further, in this Circuit, the order of proof is within the discretion of the trial judge and the Court may "admit the evidence as to all defendants, subject to a motion to strike if not connected up with all or certain defendants." *United States v. Knight*, 416 F.2d 1181, 1185 (9th Cir. 1969). *See also United States v. Testa*, 548 F.2d 847 (9th Cir. 1977). Accordingly, the motion for a pretrial evidentiary hearing should be denied.

*Recordation*

The United States does not oppose this motion.

*Suppression of Wire or Oral Communications*

There were no wire or oral communications intercepted other than conversations recorded with the consent of at least one participant thereto. Accordingly, the provisions of Title 18, United States Code, Sections 2510 and 2518 were inapplicable. *See* Title 18, United States Code, Section 2511(2)(c).

*Production of Original Tape Recordings*

Copies of recorded conversations have been furnished to counsel for defendants Garrett and Gorman. The originals are available for their inspection and/or testing under procedures to be established by the Court.

*Discovery of Mail Cover*

On information and belief, defendant Garrett has not been the subject of any mail cover.

*Dismissal of Count II*

Count II of the Indictment charges a violation of Title 18, United States Code, Section 1952, which provides in part:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> > (3) otherwise promote, manage, establish carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Venue is proper in any District of the United States in which an offense is begun, continued or completed. *See* Title 18, United States Code, Section 3237.

Several courts have addressed the issue raised by defendant Garrett and rejected his argument. In *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969), the Eighth Circuit held that a defendant may be prosecuted for a violation of Title 18, United States Code, Section 1952 in the District where the travel was completed. *See also United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) wherein the Ninth Circuit held that a defendant may be prosecuted for traveling in interstate commerce or aiding and abetting said travel in any District in which the travel occurred.

In the instant case, the travel was continued and completed in this District. Further, the unlawful activity which occurred after said travel occurred in this District. In view of the above facts and law, the motion to dismiss Count II for improper venue should be denied.

*Pretrial Conference*

The United States does not oppose this motion, but suggests that the activities outlined in the defense motion could be accomplished among counsel without requiring the intervention or supervision of the Court.

*Individual Voir Dire and Sequestration*

This is a matter committed to the sound discretion of the trial court. It is the Government's position, however, that unless a juror indicates a particular knowledge or bias based on the Court's general questions, individual *voir dire* and sequestration is inappropriate.

*Disclosure of Informants*

More than a speculative statement of need is required to compel the disclosure of informants in a particular case. *United States v. Marshall*, 532 F.2d 1279, 1282-1283 (9th Cir. 1976). *See also Lannom v. United States*, 381 F.2d 858, 861 (9th Cir. 1967). The burden is on the accused to show the need for disclosure. *United States v. Estrada*, 441 F.2d 873, 879 (9th Cir. 1971) and *Gaylor v. United States*, 426 F.2d 233, 234-235 (9th Cir. 1970). Defendant Garrett has simply failed to meet this burden.

Accordingly, the United States declines to provide the name of its informants, if any, except the name Joe Knowles, who was a precipient witness to the offenses charged in Counts I and II. The Government will make reasonable efforts to have Mr. Knowles available for trial. *United States v. Leon*, 487 F.2d 389, 392 (9th Cir. 1973), *cert. denied*, 417 U.S. 933 (1974).

*Witness List*

A list of Government witnesses is not discoverable under Rule 16, Federal Rules of Criminal Procedure. Such a list will be filed with the Court on the Friday prior to trial. As noted at the bail review hearing in this matter, one prospective witness was shot at the Thursday after the Indictment in this case was returned. The undersigned has a real and substantial concern for the safety of each prospective witness and, absent a Court order, will decline to reveal the names of such witnesses.

*Discovery*

The undersigned is aware of his responsibilities under Rule 16, Federal Rules of Criminal Procedure, and the

United States will make available all material discoverable thereunder at a time mutually convenient to the defense and to the Government. With respect to the particularized requests, the United States responds as follows using the numbering system of the motion for discovery:

7. There are no custodial statements, written or oral.

7a. To the extent that writings by the defendants may be considered statements, they will be made available by the undersigned. These writings include such items as rental agreements for certain premises and auto rental agreements.

7b. There are no post-Indictment written statements.

7c. There are tape-recorded conversations which have previously been provided to defense counsel.

7d. This material, to the extent it exists, is not discoverable under Rule 16, Federal Rules of Criminal Procedure.

7f. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

7g. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

7h. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

8. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

9. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

10. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

11. See Government's response to defendant's motion for list of witnesses.

12. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

13. This material will be provided along with the Jencks material.

14. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

15. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

16. This material will be furnished to defense counsel upon receipt.

17. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

18. This material will be provided along with the Jencks material.

19. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

20a-t. To the extent that such items exist, they will be made available to the defense at a time mutually convenient to the defense and the Government.

21a. No such evidence exists.

21b. This material is available for inspection or copying by the defense.

21c. No such evidence exists.

21d. See response to 21b, above.

21e. No such evidence exists.

21f. Lab reports of chemical analysis will be forwarded to defense counsel along with this response.

21g. Such a description is found in the DEA 7's and 7a's which accompany this response.

21h. A report of the seizure and destruction of property is attached to this response.

21i. See response to 21h, above.

21j. The United States has no objection to this request.

21k. There have been no physical, mental or polygraph tests conducted in this case.

22. As noted above, there was no electronic surveillance or wiretapping with the exception of one party consensual recordings.

23. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

24. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

25. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

26. Not discoverable under Rules 16, Federal Rules of Criminal Procedure.

27. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

28. Not discoverable under Rule 16, Federal Rules of Criminal Procedure.

29. The Court file is available for defense counsel review.

30. The undersigned is aware of his responsibilities under *Brady*. At the present time, no such information exists. To the extent that the request seeks information beyond *Brady*, it is not discoverable pursuant to Rule 16, Federal Rules of Criminal Procedure.

31. Copies of these exemplars will be returned along with this responsive pleadings.

### *Requiring a Line-up*

The undersigned affirms that the defendant Jonathan Garrett has been identified by witnesses who viewed a photo montage prior to Indictment. A hearing will establish, however, that there were no impermissibly suggestive procedures employed by the DEA agents in this case.

Identification, however, is hardly the crucial issue where, as here, at least two people who dealt with Jonathan Garrett over a substantial period of time, Joe Knowles and Luke Markishtum, will identify Jonathan Garrett as the principle participant in the marijuana importation scheme.

The cases cited by defense counsel affirm only that such a request is committed to the sound discretion of the trial court. Factors to be taken into consideration in ruling on such a request include:

(1) time between incident and requests (in this case eight months during all of which time the defendant knew, by virtue of his target status before the Grand Jury, that he was a suspect;

(2) the extent of inconvenience to prosecution witnesses;

(3) the possibility of intimidation of prosecution witnesses (a significant possibility in this case); and

(4) the degree of doubt concerning the identification (which can only be determined following a hearing on the photo-identification procedure).

*See United States v. Ravich*, 421 F.2d 1196, 1203 (2d Cir. 1970).

*Bill of Particulars*

### GENERAL PRINCIPLES

Bills of Particulars in Federal criminal cases are provided by Court order under Rule 7(f), which state as follows:

> (f) *Bill of Particulars.* The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

While bills of particulars are treated separately from general criminal discovery, they serve many similar functions. The stated purposes of such bills are two-fold: to enable the criminal defendant to prepare an adequate and intelligent defense, and to protect him against a second prosecution for an inadequately described offense. *Cook v. United States*, 354 F.2d 529 (9th Cir. 1965); *Remmer v. United States*, 205 F.2d 277 (9th Cir. 1953), *rev'd on other grounds*, 347 U.S. 227 (1954); *Yeargain v. United States*, 314 F.2d 881 (9th Cir. 1963).

Whether to grant, wholly or in part, a motion for a bill of particulars, is entrusted to the sound discretion of the trial court. *Wong Tai v. United States*, 273 U.S. 77 (1927); *Yeargain v. United States, supra.* This universal rule was explicitly stated in *Rodella v. United States*, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961), at page 310:

> . . . The determination of the extent to which a motion for a bill or particulars should be granted has been frequently and consistently held to be a matter addressed to the sole judicial discretion of the trial court. The trial court's ruling thereon should not be disturbed by us in the absence of proof of an abuse of that discretion.
>
> (Citations omitted.)

Essentially, this process is one of balancing the interests of the defendant in preparation of a defense and double jeopardy protection against the Government's interest in limiting pretrial exposure of its case. *See infra*, parts II and III. Of course, all such balancing is done in light of the nature of the charges, the pre-existing specificity of the indictment, and any additional information provided by the Government through discovery or other means.

### SPECIFIC REQUESTS

With the above principles in mind, the United States responds to the motion for a bill of particulars as follows, using the same numbering system as appears in said motion:

2a. Jonathan Garrett managed, established, carried on and facilitated an unlawful activity by arranging for the marijuana importation, soliciting persons to assist in said importation including the offloading of the "mothership" and transportation of the contraband to a campsite along the Sooes River on or about August 26, 1980;

2b. By this request defendant Garrett seeks "evidence" rather than the Government's theory of the case. A bill or particulars is not a vehicle for discovery of the Government's case. While defendants are sometimes granted particulars as to time, date and place of an alleged overt act in a conspiracy case, they have been almost universally denied particulars as to their own acts. In *United States v. Politi*, 334 F.Supp. 1318 (S.D.N.Y. 1971), a gambling conspiracy case, the Court denied disclosure of the dates, times, and places where defendants took bets. *See also United States v. Kahaner*, 203 F.Supp. 78 (S.D. N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied sub nom., Keogh v. United States*, 375 U.S. 836 (1963) (conspiracy to obstruct justice).

2c. Those who are alleged to have participated in the offense charged in Count II are the defendants Jonathan Garrett and Robert Gorman, both then believed to have been residents of Panama City, Florida.

2d. Twelve Thousand Six Hundred and Twenty-Two (12,622) pounds.

3a. It should be noted that only Count I charges a conspiracy, and Jonathan Garrett is not charged as a defendant in said Count of the Indictment. Those persons named in the substantive offense of Count II are the only known participants in the illegal activity charged therein.

3b. No overt acts are enumerated in Counts II, III or IV. The request does not make sense to Government counsel.

3c. The importation and possession with intent to distribute marijuana were done by and caused to be done by Jonathan Garrett.

3d. See response to 2b above.

3e. Jonathan Garrett is alleged to have personally imported and possessed with intent to distribute marijuana.

3f. This request is designed to elicit evidence and not available by way of a request for a bill of particulars. As noted by the Ninth Circuit in *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963):

> A defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case. [Emphasis in the original.]

3g. See response to 3f, above.

3h. A defendant is generally not entitled to the names of those persons known by the Government to have been present at the time and place of the alleged offense. *Rodella v. United States*, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961); *United States v. Rimanich*, 422 F.2d 817 (7th Cir. 1970) (per curiam); *United States v. Casserino*, 189 F.Supp. 288 (E.D.N.Y. 1960); *United States v. Tanner*, 279 F.Supp. 457 (E.D. Ill. 1967).

The reluctance of District Courts to grant such disclosure is based on a belief that this constitutes a request for the identification of Government evidence and witnesses. In *United States v. Robinson*, 42 F.R.D. 421 (S.D. N.Y. 1967), a prosecution for unlawful receipt and concealment of heroin, the Court denied the defendant's request for particulars, stating:—

> In essence defendant's request for the names and identities of other tenants of the apartment involved, the owners and agents of the building, the persons present (other than Government agents or officers) seeks disclosure of evidence and names of witnesses, rather than a delineation of the charges or claims which is the essential function of a bill.

It should be noted that appellate review of such decisions is limited to a recognition of and deferral to the discretion of the trial judge. As was stated in *United States v. Rimanich, supra:*

> Although it is not uncommon for the government to be required to disclose the names of some potential witnesses in a bill of particulars where that information is necessary for a defendant's preparation, . . . we do not consider the refusal of the district judge in this case to constitute an abuse of his discretion.

Some District judges have, in the exercise of such discretion, ordered the Government to produce and disclose such material. *See e.g., United States v. Covelli,* 210 F. Supp. 589 (E.D. Ill. 1962); *United States v. Willis,* 33 F.R.D. 510 (S.D. N.Y. 1963).

3i. See response to 3h, above.

3j. See response to 3h, above.

4a. Since Count III does not charge a conspiracy, Government counsel is unable to respond to this request.

4b. See response to 3h, above.

4c. See response to 3h, above.

4d. See response to 3h, above.

4e. See response to 3h, above.

4f. August 26, 1980.

4g. Unknown.

4h. See response to 3h, above.

5a. Since Count IV does not charge a conspiracy, Government counsel is unable to respond to this request.

5b. See response to 5a, above.

5c. See response to 3h, above.

5d. See response to 3h, above.

5e. See response to 3h, above.

DATED this 29th day of April, 1981.

Respectfully submitted,

JOHN C. MERKEL
United States Attorney

/s/ Francis J. Diskin
Assistant United States Attorney

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JUDGMENT AND COMMITMENT (Rev. 2-68)
Cr. Form No. 25

## UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. CR81-62M

UNITED STATES OF AMERICA

v.

JONATHAN GARRETT

On this 20th day of August, 1981 came the attorney for the government and the defendant appeared in person and with his counsel, Philip A. DeMassa.

It Is Adjudged that the defendant upon his plea of GUILTY to Count III of the Indictment and the Court being satisfied there is a factual basis for the plea, has been convicted of the offense of importing and aiding and abetting the importation of marijuana in violation of Title 21, United States Code, Sections 952, 960(a)(1), and 960(b)(2), and Title 18, United States Code, Section 2, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS.

IT IS FURTHER ORDERED of this Court that the defendant serve a special parole term of FIVE (5) YEARS.

IT IS ADJUDGED that the defendant pay a fine to the United States in the sum of $15,000.00.

IT IS ORDERED that Counts II and IV of the Indictment dated March 17, 1981, Cause CR81-62M, are hereby dismissed as to defendant Garrett upon the motion of the Government.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Presented by:

/s/ Francis J. Diskin
Assistant United States Attorney

/s/ Walter T. McGovern
United States District Judge.

______________________
Clerk.

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JONATHAN GARRETT, ROBERT HOSKINS,
CHRISTOPHER GARRETT, DONALD McMICHAELS,
CAESAR GARCIA, SR., a/k/a PAPASAN,
NORMAN VICK,
Defendants.

## INDICTMENT

THE GRAND JURY CHARGES:

### COUNT 1

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida, and in divers other districts,

JONATHAN GARRETT,
ROBERT HOSKINS,
CHRISTOPHER GARRETT,
DONALD McMICHAELS,
CAESAR GARCIA, SR.,
a/k/a PAPASAN,
and
NORMAN VICK,

did unlawfully, wilfully and knowingly combine, conspire, confederate and agree with each other and with other persons both known and unknown to the Grand Jury, to import into the United States from outside the territorial limits thereof, marihuana, a schedule I controlled substance, in violation of Title 21, United States Code, Section 952; all in violation of Title 21, United States Code, Sections 960 and 963.

It was a part of the conspiracy that in or about 1976, JONATHAN GARRETT and others known and unknown to the Grand Jury did combine and confederate to establish and did in fact establish a criminal enterprise existent for the purpose of importing into the United States of America from a place outside thereof multi-ton quantities of marihuana and marihuana "Thai sticks," a schedule I controlled substance.

It was further a part of the conspiracy that during the period from in or about the early part of 1976, and continuing up to July, 1981, JONATHAN GARRETT, ROBERT HOSKINS, CHRISTOPHER GARRETT, DONALD McMICHAELS, CAESAR GARCIA, SR., NORMAN VICK, and others known and unknown, did knowingly and intentionally confederate, affiliate and associate with said enterprise for the purpose of effecting the criminal objectives thereof.

It was further a part of the conspiracy that the defendants, co-conspirators, would utilize seafaring vessels, instrumentalities of interstate and foreign commerce, to effectuate the importation of marihuana and marihuana "Thai sticks" into the United States of America.

It was further a part of the conspiracy that the defendants, co-conspirators, would utilize the telephone, an instrumentality of interstate commerce, to facilitate the importation of marihuana and marihuana "Thai sticks" into the United States of America.

It was further a part of this conspiracy that JONATHAN GARRETT and DONALD McMICHAELS would function as masters of seafaring vessels which were laden with multi-ton loads of marihuana.

It was further a part of this conspiracy that JONATHAN GARRETT, ROBERT HOSKINS, and CHRISTOPHER GARRETT would recruit people to off-load marihuana from seafaring vessels.

It was further a part of this conspiracy that JONATHAN GARRETT, ROBERT HOSKINS, and CHRISTOPHER GARRETT would find sites to off-load multi-ton loads of marihuana from seafaring vessels.

It was further a part of this conspiracy that CAESAR GARCIA, SR., would provide a warehouse for the purpose of concealing the off-loading of seafaring vessels and concomitant on-loading into trucks and other motor vehicles of marihuana.

It was further a part of this conspiracy that CAESAR GARCIA, SR., would supervise the loading of marihuana into seafaring vessels off the coast of the Republic of Colombia.

It was further a part of this conspiracy that NORMAN VICK would fly an aircraft in countersurveillance during smuggling operations.

## OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the defendants and other co-conspirators did commit, among others, the following Overt Acts:

1. In or about the month of December, 1976, CHRISTOPHER GARRETT met with Jack Nichols near the Fourchan docks in LaFourche Parrish, Louisiana, and solicited Nichol's help to bring in a boatload of marihuana.

2. In or about the month of December, 1976, JONATHAN GARRETT brought a vessel, the "Buck Lee" into Fourchan Landing, Louisiana, with a load of about 30,000 pounds of marihuana.

3. In or about the month of December, 1976, JONATHAN GARRETT, CHRISTOPHER GARRETT, DONALD McMICHAELS, Thomas Ruth, Jack Nichols and other persons unloaded approximately 30,000 pounds of marihuana from the vessel "Buck Lee."

4. In or about the month of January, 1977, JONATHAN GARRETT gave Jack Nichols a shopping bag containing $50,000 in cash currency.

5. In or about the month of May, 1977, JONATHAN GARRETT, DONALD McMICHAELS, ROBERT HOSKINS, Robert Gorman, Thomas Ruth and others met at a house in Lake Charles, Louisiana, and planned a marihuana smuggling operation.

6. In or about the month of June, 1977, JONATHAN GARRETT, ROBERT HOSKINS, CAESAR GARCIA, SR., Robert Gorman and others met at a warehouse in LaRose, Louisiana.

7. In or about the month of June, 1977, JONATHAN GARRETT, ROBERT HOSKINS, DONALD McMICHAELS, Doug Hoskins, Robert Gorman and others met at a boat yard near Crown Point, Louisiana.

8. In or about the month of June, 1977, at about 12:00 midnight, a vessel, the "Mr. Frank," arrived with a multiton load of marihuana at the boat yard near Crown Point, Louisiana.

9. In or about the month of June, 1977, in the early morning hours, near Crown Point, Louisana, JONATHAN GARRETT, ROBERT HOSKINS, DONALD McMICHAELS, Doug Hoskins, Robert Gorman and others unloaded several tons of marihuana from the vessel "Mr. Frank" and loaded this marihuana into three trucks.

10. In or about the month of June, 1977, ROBERT HOSKINS and Robert Gorman drove a truck loaded with several tons of marihuana from Crown Point, Louisiana, to Hope, Arkansas.

11. In or about the month of January, 1979, NORMAN VICK talked to Joe Knowles about smuggling marihuana with JONATHAN GARRETT.

12. On or about January 30, 1979, NORMAN VICK and Joe Knowles travelled by commercial airline from Panama City, Florida to Atlanta, Georgia.

13. On or about February 1, 1979, Joe Knowles met with JONATHAN GARRETT and NORMAN VICK in Atlanta, Georgia, and discussed importing marihuana.

14. In or about May, 1979, ROBERT HOSKINS telephoned Michael Holman in Panama City, Florida.

15. In or about May, 1979, JONATHAN GARRETT, ROBERT HOSKINS, NORMAN VICK, DONALD McMICHAELS, Michael Holman and others met at the Howard Johnson's Motel in Mobile, Alabama, and discussed importing 40,000 pounds of marihuana.

16. In or about June, 1979, ROBERT HOSKINS told Michael Holman that HOSKINS would pay Holman $45,000 to take the vessel "Morning Star" to Colombia and return with 40,000 pounds of marihuana.

17. In or about June, 1979, ROBERT HOSKINS and Michael Holman travelled from Mobile, Alabama, to Panama City, Florida, to pick up a speedboat which was to be used to off-load marihuana from the vessel "Morning Star."

18. In or about June, 1979, Michael Holman and four other persons took the vessel "Morning Star" from Mobile, Alabama, to Santa Marta, Colombia, South America.

19. In or about June, 1979, CAESAR GARCIA, SR., boarded the vessel, "Morning Star" off the coast of Santa Marta, Colombia, South America.

20. In or about June, 1979, CAESAR GARCIA, SR., told the crew of the "Morning Star" that if they waited

through a delay in arranging the loading of marihuana aboard the vessel "Morning Star" they would each receive an extra $5,000 and two bales of marihuana.

21. In or about June, 1979, off the coast of Santa Marta, Colombia, the vessel "Morning Star" was loaded with approximately 28,145 pounds of marihuana.

22. In or about June, 1979, on the Gulf of Mexico, NORMAN VICK flew an airplane over the vessel "Morning Star" in counter-surveillance.

23. In or about June, 1979, the vessel "Morning Star," carrying 28,145 pounds of marihuana, was boarded by the United States Coast Guard.

24. On or about May 16, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

25. On or about May, 1979, JONATHAN GARRETT and Joe Knowles drove down the coast of California from San Francisco to Los Angeles looking for sites to off-load marihuana.

26. On or about June 1, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

27. On or about June 13, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

28. On or about July 18, 1979, CHRISTOPHER GARRETT talked to Joe Knowles by telephone.

29. On or about July 19, 1979, CHRISTOPHER GARRETT and Joe Knowles inspected the vessel "Clipper Cozumel" at the city marina in Panama City, Florida, and discussed using this vessel to smuggle marihuana.

30. On or about July 24, 1979, Joe Knowles met JONATHAN GARRETT in Room 831 of the Omni Hotel in Atlanta, Georgia, and discussed importing marihuana into the United States. JONATHAN GARRETT gave Joe Knowles $1,000.

31. On or about July 25, 1979, Joe Knowles met CHRISTOPHER GARRETT at the Sheraton Inn in Kenner, Louisiana, and discussed a plan to import marihuana.

32. On or about August 18, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

33. On or about August 22, 1979, JONATHAN GARRETT telephoned Joe Knowles in Panama City, Florida.

34. On or about October 25, 1979, Joe Knowles met with JONATHAN GARRETT, DONALD McMICHAELS, Robert Gorman and others in Bellevue, Washington, and discussed plans to import a shipload of marihuana.

All in violation of Title 21, United States Code, Sections 960 and 963.

## COUNT II

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

JONATHAN GARRETT
ROBERT HOSKINS
CHRISTOPHER GARRETT
DONALD McMICHAELS
CAESAR GARCIA, a/k/a PAPASAN
and
NORMAN VICK

did unlawfully, willfully and knowingly combine, conspire, confederate and agree with each other and with other persons both known and unknown to the Grand Jury, to possess with intent to distribute and to distribute marihuana, a schedule I controlled substance, in violation of Title 21, United States Code, Section 841; all in violation of Title 21, United States Code, Section 846.

## COUNT VII

That on or about June, 1979, in the Northern District of Florida,

JONATHAN GARRETT,

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 846; in violation of Title 21, United States Code, Section 843(b).

## COUNT VIII

On or about June 13, 1979, in the Northern District of Florida,

JONATHAN GARRETT,

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

## COUNT IX

That on or about August 8, 1978, in the Northern District of Florida, JONATHAN GARRETT,

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

### COUNT X

That on or about August 22, 1978, in the Northern District of Florida,

JONATHAN GARRETT,

defendant herein, did knowingly, willfully, and intentionally use a communications facility, that is, a telephone, to facilitate acts constituting a felony under Title 21, United States Code, Sections 963 and 952; in violation of Title 21, United States Code, Section 843(b).

### COUNT XI

That from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

JONATHAN GARRETT,

defendant herein, unlawfully, willfully, knowingly and intentionally did engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a) (1), 843(b), 846, 952 and 963, which violations were part of a continuing series of violations of said statutes undertaken by said defendant in concert

with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, or manager, and from which continuing series of violations the defendant obtained substantial income and resources to which the United States is entitled for forfeiture, including all profits obtained by the defendant, JONATHAN GARRETT, arising from his participation in this enterprise, and any of his interest, property, and contractual rights of any kind affording a source of influence over this enterprise, including but not limited to a yacht described and identified as the "Sun Chaser III," in violation of Title 21, United States Code, Section 848.

A TRUE BILL:

Huber Hill
FOREPERSON
July 16, 1981
DATE

David T. McGee
ASSISTANT UNITED STATES ATTORNEY

Dana Biehl
DANA BIEHL, SPECIAL ATTORNEY
Department of Justice

Ronald LeGrand
RONALD LeGRAND, SPECIAL ATTORNEY
Department of Justice

CERTIFIED A TRUE COPY
MARVIN S. WAITS, CLERK

By Masie Sweeney
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JONATHAN GARRETT,
Defendant.

## MOTION TO DISMISS

COMES NOW the defendant, JONATHAN GARRETT, by and through his undersigned attorney, and moves to dismiss Counts I, II and XI of the indictment filed herein on the ground that the defendant's right to protection under the United States Constitution to be immune to being twice prosecuted for the same offense, as guaranteed by the double jeopardy clause of the Fifth Amendment has been violated as well as rights guaranteed under the Speedy Trial Act, rules against multiplicitous litigation and Eighth Amendment protections. Pursuant to a plea negotiation with the United States Government the defendant entered a plea of guilty to one count of the indictment filed against him in the United States District Court for the Western District of Washington, at Seattle, in indictment number CR81-062M, the United States of America vs. Jonathan Garrett, Robert Gorman, Ron DePoe, Michael Johnson, a/k/a Michael Minikin. See Indictment attached hereto.

WHEREFORE, the movant requests the Court to enter an order barring prosecution under this indictment and dismissing said indictment on the grounds stated above.

## MEMORANDUM OF LAW

### COUNTS I and II:

A. It is a well settled statement of criminal law that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee under the United States Constitution, Fifth Amendment. *See, Braverman v. United States*, 317 U.S. 49 (1942), and *United States v. Tanner*, 471 F.2d 128, 141 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). Further, the Courts have held that the double jeopardy clause shall apply even if some of the named co-conspirators are different in the two indictments under consideration. *See, United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). And this is so even if the two indictments allege different overt acts. *Short v. United States*, 91 F.2d 614 (4th Cir. 1937).

To determine whether a single conspiracy has been arbitrarily subdivided, resulting in multiple indictments for that single illegal unlawful agreement which constitutes a conspiracy, and thus violating the double jeopardy guarantee, it has been held that the Courts should look to both the indictments, and the evidence, and consider such factors as whether the conspiracies involve the same time period, as well as the same alleged co-conspirators, places, overt acts, and whether or not the conspiracies alleged depend upon each other for success. *Uinted States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980). Where several of these factors are present and in common the conclusion follows that the alleged illegal combinations are not separate and distinct offenses but in fact one offense. *United States v. Marable,* 578 F.2d 151 (5th Cir. 1978); *United States v. Mallah, supra;* and *United States v. Cooper,* 442 F.Supp 1259 (D.Minn. 1978).

It is readily apparent from a simple view of the overt acts alleged in the indictment delivered in the State of Washington and the indictment delivered in the State of Florida, that the co-conspirators are the same, that the period of conspiracy alleged in the Washington conspiracy is encompassed within the period of the alleged conspiracy in the Florida indictment, that the places alleged in both indictments are in many cases the same as well as the overt acts themselves, and that the Florida conspiracy which encompasses a greater period in time was dependent for success upon the conspiracies alleged to have taken place in the State of Washington.

Further, it is the undersigned counsel's belief that since the defendant has plead guilty to the Washington indictment or a part thereof without a trial, that the evidence necessary to properly analyze this motion is not available, and that the only available means for properly arguing this motion is the discovery of the grand jury minutes en toto from the State of Washington which led to the initial indictment, so that they may be compared against the grand jury minutes en toto in the State of Florida and/or the evidence which will be delivered at the trial of this cause. It is submitted that if this motion is denied without a granting of motions for grand jury testimony filed contemporaneously herewith that the defendant's constitutional rights will be jeopardized.

The defendant plead guilty to Count III of the Washington indictment charging him with intentionally importing marijuana into the United States in violation of 21 U.S.C. § 952, § 960(a)(1) and § 960(b)(2), and 18 U.S.C. § 2. In return Count II (charging traveling in interstate commerce from Panama City to Bellevue, Washington, to promote the importation of marijuana in violation of 18 U.S.C. § 1952(a)(3), (2) and Count IV (charging possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2) were dismissed.

Therefore, the comprehensive conspiracy charged in Count I of the Florida indictment is barred due to a prior conviction and plea bargain, and the count even alleges a conspiracy to import into "divers other jurisdictions". It is submitted that Jonathan Garrett has already plead guilty to aiding and abetting importation into the United States and to allow the Government to proceed violates double jeopardy guarantees.

B. Count II of the (Florida) indictment (charging a conspiracy to possess with intent to distribute) is also barred as it is similarly another attempt to circumvent the double jeopardy provision of the Constitution in that it is substantially the same as the count dismissed in exchange for a plea bargain in Washington (Count IV). *See, United States v. Marable, supra; United States v. Castro,* at 461. The only difference is that the Government has chosen to bring charges for a narrow period first, and the later recharge, arbitrarily, enlarging the alleged conspiracy period to cover a five year period and include the substantive violation.

C. The Washington indictment should also be examined for in Count I thereby, all defendants were charged with conspiracy contrary to 21 U.S.C. § 952 (importation), and indicated Jonathan Garrett as a "co-conspirator but not as a defendant." By omitting his name, but proceeding on the substative counts the Department of Justice has amply demonstrated that they did not wish to bring all charges in a single proceeding but deliberately to delay conspiracy charges and continuing criminal enterprises charges until *after* a conviction has been secured, even though they could have proceeded at that time. As argued below, and in the Motion to Compel Consolidation, this motion only violates multiple rights but should constitute prosecutorial misconduct. Motion at 7-9.

## CONTINUING CRIMINAL ENTERPRISE:

Also the continuing criminal enterprise charge of Count XI of the Florida indictment is subject to dismissal on double jeopardy grounds, as well as speedy trial, rules protecting defendants from multiplicitous prosecution, and cruel and unusual punishment.

A. The defendant when available for trial in the State of Washington was made aware of the fact that the United States Attorney was prepared to go forward with a prosecution for violating 21 U.S.C. § 848, Continuing Criminal Enterprise (CCE hereafter). The Department of Justice instructed the United States Attorney not to seek an indictment under that statute since it had elected to prosecute in the Fifth Circuit Court of Appeals jurisdiction (now the Eleventh). A Motion to Compel Consolidation of charges to have the CCE tried in one proceeding was denied; a copy of the motion is attached hereto and incorporated by reference herein. For purposes of brevity the argument with regard to multiplicitous prosecu-

tions by the Government for the original Motion to Compel, pp. 4-6, is adopted.

B. This defendant's right to a speedy trial on a Section 848 charge has also been denied, as argued on pp. 6-7 of the original Motion to Compel Consolidation.

The provisions of 18 U.S.C. § 3161 should be applicable in that since the Government could have filed the CCE charge but deliberately chose not to do so until after the defendant had plead guilty in Washington (the ramifications of which will be discussed below), since "conduct . . . arising from the same criminal episode is involved." Thus, the indictment charging this defendant with a CCE violation should have been filed within 30 days of the date of his arrest (which was on or about March 26, 1981, according to the Docket, p.2, in case CR81-62M). *See* 18 U.S.C. § 3161(b), and (d)(i).

Also ***F.R.Crim.Pro.*** 48 codifying the Court's inherent power to dismiss a case for want of prosecution implements the rights expressed in 18 U.S.C. § 3161 and the Sixth Amendment. "If there is unnecessary delay in presenting the charge for the grand jury . . . or in bringing a defendant to trial, the court may dismiss the indictment . . ." It is submitted the delay was unnecessary, and a deliberate, tactical maneuver by the Government to secure unfair advantage. *See, United States v. Ramos,* 586 F.2d 1078 (5th Cir. 1978).

18 U.S.C. § 3162(a)(1), Sanctions, indicates that the Court should consider, inter alia, the seriousness of the offense (an attempt to give Jonathan Garrett a 20 year minimum sentence); the facts and circumstances of the case (discussed elsewhere); and, the import of the repro-

secution on the administration of justice ("justice" requires the Government to proceed in a single proceeding whenever possible). It should be noted that the defendant's Motion to Compel Consolidation was in the nature of a demand for a trial on the issue then, which was resisted by the Government. A deliberate attempt to delay trial to prejudice the defendant or gain a tactical advantage should weigh heavily against the prosecution. *See, Barker v. Wingo,* 407 U.S. 514, 531-33 (1972), and 8B *J. Moore, Federal Practice* ¶ 48.04[3] (2d ed. 1981).

C. The previous double jeopardy arguments also apply herein. The evidence of the ongoing conspiracy is substantially the same in all cases, and although multiple conspiracy prosecutions have been approved the necessity for a single proceeding is required. See, *United States v. Rodriguez,* 612 F.2d 906, 920 (5th Cir. 1980) ("We find that where Congress intended to permit the District Court, in the careful exercise of its discretion, to impose consecutive sentences, convicting and sentencing a defendant *in one proceeding* to cumulative punishments does not put the defendant twice in jeopardy." Emphasis supplied.)

It should be stressed that the burden of proof here should be on the Government since a non-frivolous double jeopardy argument has been advanced, and it has been held that a previous prosecution under 21 U.S.C. § 846 (conspiracy) is a lesser included offense of § 848 (*See, United States v. Stricklin,* 591 F.2d 1112, 1113 (5th Cir. 1979); this case is also supportive of the Speedy Trial argument above). This impracticality of placing the burden on the defendant is obvious since he lacks access to the proof upon which the Government proposes to rely and he cannot offer immunity to prospective witnesses.

Especially where, as here, a prior indictment has been dismissed so there is no record of the evidence; the burden should be on the Government. *Stricklin, supra,* at 1118. *Only* the Grand Jury minutes supporting the Washington indictment can settle this issue.

D. Lastly, this defendant's Eighth Amendment rights to the protection from cruel and unusual punishment are imperiled. *See* Motion to Compel Consolidation p. 7. This is pointed up in *Rodriguez, supra* where the Fifth Circuit, en banc, held:

> In deference to this observation, we feel that the Supreme Court in action as well as words has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding. This is not to say that Congress could so fragment a conspiracy that the aggregate punishment becomes cruel and unusual, but protection from that action derives from the Eight Amendment, not the Double Jeopardy Clause. *See, United States v. Marotta* [518 F.2d 681 (9th Cir. 1975)], *supra* at 685.
>
> . . .
>
> We conclude with a cautionary admonition. First, our holding that double jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution area, and the Government would be well-advised to bring all of its charges (relating to a single conspiracy) in a single proceeding. *Cf. Ashe v. Swenson,* [397 U.S. 436 (1970)] *supra.* Second, we caution the District Courts that our holding does not require the imposition of consecutive sentences but rather only permits such imposition, within the sound discretion of the sentencing forum.

Thus, Counts I, II and XI should be dismissed.

I HEREBY CERTIFY that a copy of the foregoing Motion To Dismiss has been furnished, by mail, to David L. McGee, Assistant United States Attorney, P. O. Box 1308, Tallahassee, Florida 32302, and to counsel for all co-defendants, this 22nd day of September, 1981.

/s/ Paul G. Komarek
P. O. Box 2334
Panama City, Florida 32401
(904) 769-2407

ATTORNEY FOR DEFENDANT
JONATHAN GARRETT

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JONATHAN GARRETT,
Defendant.

## MOTION FOR BILL OF PARTICULARS

COMES NOW the defendant, JONATHAN GARRETT, by and through his undersigned attorney, and pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, hereby moves this Court to enter an order directing the United States of America to file a Bill of Particulars as to the following matters concerning the offenses charged in the indictment herein:

## PARTICULARS

1. As used in this Motion, the terms "co-conspirator" or "co-defendant" wherever they may appear include all alleged co-conspirators and co-defendants, both those indicted as well as those not indicted.

2. With respect to those allegations contained in Count I of the indictment state:

(a) The exact manner in which Jonathan Garrett combined, conspired, confederated or agreed with other persons to import marijuana into the United States;

(b) State the exact date, place, and time, as best known to the Government, that the conspiracy alleged in this indictment was formed;

(c) State the exact location in the Northern District of Florida that the Government contends that the defendant Garrett and co-conspirators did conspire together with others;

(d) State where else, beside the Northern District of Florida, the Government contends that defendant Garrett and co-conspirators did conspire together and with others;

(e) When the telephone communication was made, where was the defendant Jonathan Garrett located at the time;

(f) At the time of the communication in each Count where was the person on the other end of the telephone line located in each Count.

5. With respect to those allegations contained in Count XI of the indictment, state:

(a) With regard to the continuing criminal enterprise alleged the names of all persons, presently known to the Government, and their addresses at the time of their alleged participation in the unlawful activity, who constitute the five other persons with respect to whom the defendant occupied a position of organizer, supervisor, or manager;

(b) State the amount of income in resources upon which the Government intends to rely to prove a continuing criminal enterprise, and for each instance state the person from whom said money or resource was obtained, as well as his address at the time of the alleged incident, and at the present time;

(c) State specifically what violations are referred to, and their dates and participants, for each incident relied upon to prove "a continuing series of violations";

## MEMORANDUM OF LAW

This Motion is not an attack on the sufficiency of the Indictment. The fact that the Indictment is valid is not a defense to a Motion for a Bill of Particulars, ***United States v. Faulkner***, 53 F.R.D. 299, 310 (Wis. 1971), since the underlying purpose of Rule 7(f) of the Federal Rules of Criminal Procedure is not to cure defects in the Government's pleading, but rather to furnish the Defendant *further information* respecting the charge stated in the

indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial. ***United States v. Bearden***, 423 F.2d 805, 809 (5th Cir. 1970); ***United States v. Haskins***, 345 F.2d 111, 114 (6th Cir. 1965); ***Pipkin v. United States***, 243 F.2d 491 (5th Cir. 1957); and ***United States v. Smith***, 16 F.R.D. 372, 375 (W.D. Mo. 1954). Further, where the information sought is necessary to the preparation of a defense or to prevent surprise, then the ". . . accused is entitled to this 'as of right'" regardless of whether such disclosure would be privileged or otherwise. ***United States v. Smith***, 16 F.R.D. 372 (W.D. Mo. 1954); Wright, *Federal Practice and Procedure* § 129, at pp. 282-283. *See also*, ***United States v. United States Gypsum***, 37 F.Supp. 398, 402 (D.D.C. 1941); and ***Singer v. United States***, 58 F. 2d 74 (3rd Cir. 1932).

The names of all co-conspirators requested in this Motion, who are not named in the indictment, but are known to the prosecution, should be provided by the Government by Bill of Particulars. ***United States v. Burgio***, 279 F. Supp. 843, 846 (S.D. N.Y. 1968); ***United States v. Tanner***, 279 F.Supp. 457 475 (N.D. Ill. 1967); ***United States v. Pilnick***, 267 F.Supp. 791, 801 (S.D. N.Y. 1967); and ***United States v Baker***, 262 F.Supp. 657, 675 (D.D.C. 1966).

The overt acts requested in this Motion which are not specified in the indictment but which the Government contends were committed in the furtherance of the alleged conspiracy and upon which the Government may rely at trial, should be provided by the Government by Bill of Particulars. ***United States v. Leach***, 427 F.2d 1107, 1110 (1st Cir. 1970), *cert. denied*, 406 U.S. 829; ***United State***
***v. Tanner***, 279 F.Supp. 457, 478 (N.D. Ill. 1967); ***Unite***

*States v. Pilnick,* 267 F.Supp. 791, 801 (S.D. N.Y. 1967); *United States v. Baker,* 262 F.Supp. 657, 675 (D.D.C. 1966).

The precise time of day, place and location where the overt acts of the alleged conspiracies were committed which are requested should be produced by the Government by Bill of Particulars since Jonathan Garrett is entitled to be apprised of the precise time of day and place within a city or other area in which an offense is alleged to have occured, *United States v. Burgio,* 279 F.Supp. 843, 846 (S.D. N.Y. 1968); *United States v. Lubomski,* 277 F.Supp. 713 (N.D. Ill. 1967); *United States v. Dean,* 266 F.Supp. 159 (S.D. N.Y. 1966); *United States v. Giramonti,* 26 F.R.D. 168 (D. Conn. 1960); *United States v. Wilson,* 20 F.R.D 569 (S.D. N.Y. 1957); *United States v. Smith,* 16 F.R.D. 372 (W.D. Mo. 1954); as well as the time and place where each overt act of a conspiracy is alleged to have been performed. *United States v. Tanner,* 279 F.Supp. 457, 475 (N.D. Ill. 1967); *United States v. Crisona,* 271 F.Supp. 150, 156 (S.D. N.Y. 1967).

The particular acts alleged to have been personally performed by Jonathan Garrett requested in this Motion should be provided by the Government by a Bill of Particulars. *United States v. Tanner,* 279 F.Supp. 457, 474-476 (N.D. Ill. 1967).

The time, date, place and manner in which Jonathan Garrett is alleged to have become a member of the charged conspiracies should be provided by the Government by a Bill of Particulars. *United States v. Tanner,* 279 F.Supp. 457, 474 (N.D. Ill. 1967).

The manner in which Jonathan Garrett is alleged to have aided, abetted, counseled, commanded, induced, procured or caused the commission of the offenses requested in this Motion, including the dates, places and nature of the acts by which it is claimed that Jonathan Garrett accomplished same, should be provided by the Government by Bill of Particulars. *United States v. Baker,* 262 F.Supp. 657, 674 (D.D.C. 1967). See also, *United States v. Tucker,* 473 F.2d 1290 (6th Cir. 1973); *United States v. Bel-Mar Laboratories,* 284 F.Supp. 875, 888 (E.D. N.Y. 1968); *United States v. Burgio,* 279 F.Supp. 843 (S.D. N.Y. 1968).

The names of any persons present at or who participated in the commission of the offense as requested in this Motion should be provided by the Government by Bill of Particulars. *United States v. Rimanich,* 422 F.2d 817 (7th Cir. 1970); *United States v. Cummings,* 49 F.R.D. 160 (S.D. N.Y. 1969); *United States v. Tanner,* 279 F.Supp. 457 (N.D. Ill. 1967); *United States v. Acarino,* 270 F.Supp. 526 (E.D. N.Y. 1967); *United States v. Pilnick,* 267 F.Supp. 791 (S.D. N.Y. 1967); *United States v. Tucker,* 262 F.Supp. 305, 307 (S.D. N.Y. 1966); *United States v. Willis,* 33 F.R.D. 510 (S.D. N.Y. 1963); *United States v. Covelli,* 210 F.Supp. 589 (N.D. N.Y. 1962).

With regard to the particulars requested in this Motion relating to the alleged conspiracies it is imperative that the Government provide Jonathan Garrett with the precise period of said alleged conspiracies or illegal activities, as well as when said conspiracies or illegal activities began, in order to determine whether or not certain acts or conduct fall within the applicable statute of limitations and to adequately prepare defenses thereto; to be provided with particulars as to the names of alleged co-conspirators who personally committed the various acts alleged therein in order to adequately prepare a defense thereto, *United States v. Tanner*, 279 F.Supp. 457, 474-476 (N.D. Ill. 1967); and to determine the dates when any of these acts in furtherance of the alleged conspiracies took place. *United States v. Dean*, 266 F.Supp. 159 (S.D. N.Y. 1966); *United States v. Giramonti*, 26 F.R.D. 168 (D. Conn. 1960); *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

> "Without definite specification of the time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may well be difficulty in preparing to meet the general charges of the information, and some danger of surprise." *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

The particulars requested with regard to allegations of a continuing criminal enterprise are required by *United States v. Johnson*, 575 F.2d 1347, 1356 (5th Cir. 1978).

Rule 7(f) of the Federal Rules of Criminal Procedure has generally been interpreted to require production of evidentiary details establishing the facts of an offense. *Van Liew v. United States*, 321 F.2d 664, 670 (5th Cir. 1963). The defendant in a criminal prosecution is not only presumed to be innocent, but he also must be presumed to be ignorant of the facts on which the charges are based. *United States v. Smith*, 16 Fed.Rd Dec. 372 (D.Mo. 1954); *United States v. Moore*, 57 F.R.Dec. 640 (N.D.Ga. 1972).

The particulars requested above are not only necessary to avoid surprise at trial and permit defendant to properly investigate the factual basis for the charges and prepare his defense for trial, but are also requested to enable the defendant to plead double jeopardy in the event

of a subsequent prosecution for the same offense. *United States v. Perez*, 489 F.2d 51, 70 (5th Cir. 1973).

## SUMMARY AND CONCLUSIONS

This Motion is not interposed for delay, but rather the matters and particulars hereinabove requested are essential to enable Jonathan Garrett to adequately be apprised of the nature and scope of the accusations against him, as guaranteed by the Sixth Amendment to the Constitution of the United States, to have an opportunity to adequately prepare his defense, to avoid prejudicial surprise at trial, to clarify the issues herein and avoid confusion and delay at trial, and to enable him to be protected against a second prosecution for the same offense and plead double jeopardy thereto as guaranteed by the Fifth Amendment to the Constitution of the United States.

The particulars requested herein are within the knowledge and control of the Government and its agents, and cannot be obtained by Jonathan Garrett other than by Order of this Court. The particulars requested herein are not privileged and compliance poses no undue burden on the Government.

WHEREFORE, premises considered, and for such other reasons as may appear to this Court at hearing, Jonathan Garrett prays as follows:

(a) That a hearing be held in the matter of this Motion as soon as practicable, but in any event, sufficiently in advance of trial to enable him to obtain the particulars ordered by the Court and to use them to prepare necessary pretrial motions and trial defenses;

(b) That the Court order the Government to furnish a Bill of Particulars as requested in this Motion;

(c) That as to any items in the Motion concerning which the Government shall state in its Bill of Particulars that its knowledge or information is incomplete, the Government shall set forth in its Bill of Particulars whatever information and knowledge it may have and shall furnish particulars upon obtaining further knowledge or information prior to trial;

(d) That Jonathan Garrett be allowed to supplement and amend this Motion as may be necessary based on further discovery as provided by the Government or as may be ordered by the Court, for which he cannot now be aware of or plan for; and

(e) That he be awarded such other and further relief as this Honorable Court deems just and proper.

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to David L. McGee, Assistant United States Attorney, P. O. Box 1308, Tallahassee, Florida 32302, and to counsel for all co-defendants, this 22nd day of September, 1981.

/s/ PAUL G. KOMAREK
P. O. Box 2334
Panama City, FL 32401
(904) 769-2407

ATTORNEY FOR DEFENDANT
JONATHAN GARRETT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JONATHAN GARRETT,
Defendant.

## GOVERNMENT'S RESPONSE TO DEFENDANT JONATHAN GARRETT'S MOTION FOR BILL OF PARTICULARS AND MEMORANDUM OF LAW

Comes now the Government and opposes the Defendant's motion. The indictment in this case is a thorough and complete statement of the charges against the Defendant. That indictment in conjunction with the Rule 16 response of the Government sufficiently apprises the Defendant of the charges against him to allow him to prepare his defense and to plead double jeopardy in the event of subsequent prosecution for the same offense. The information requested by the Defendant is so broad as to constitute discovery. A Bill of Particulars should not be used for the purpose of compelling the Government to disclose, prior to trial, its evidence, theory of prosecution and witnesses. *United States v. Pereg*, 489 F.2d 51 (5th Cir. 1973); *Overton v. United States*, 403 F.2d 444 (5th Cir. 1968).

The granting of a Bill of Particulars is addressed to the sound discretion of the trial court. The exercise of such discretion cannot be reversed on appeal unless the appellate court concludes that the defendant was actually surprised and prejudiced. *United States v. Mackey*, 551 F.2d 967 (5th Cir. 1977).

For the foregoing reasons, the Government would request that the Court deny the Defendant's request for a Bill of Particulars.

NICKOLAS P. GEEKER
United States Attorney

/s/ David L. McGee
Assistant United States Attorney
110 East Park Avenue, Room 100
Tallahassee, Florida 32301
904/224-3186

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## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JONATHAN GARRETT,
Defendant.

## RESPONSE TO JONATHAN GARRETT'S MOTION TO DISMISS FOR DOUBLE JEOPARDY

Comes now the United States of America, by and through its undersigned counsel, and respectfully requests this Honorable Court to deny the defendant's Motion to Dismiss the Indictment for violations of the Double Jeopardy Clause of the United States Constitution.

The defendant's motion is clearly frivolous and is an obvious attempt to delay the start of this trial while an appeal is taken under *Abney v. United States*, 431 U.S. 651 (1977). The United States respectfully requests that this Honorable Court find this motion to be frivolous under *United States v. Dunbar*, 611 F.2d 985 (1980) and retain jurisdiction so that the trial can proceed as now scheduled.

The Government's Florida indictment does not subject the defendant to double jeopardy based upon an examination of the current law of double jeopardy. The *Blockburger* doctrine has continuing vitality as evidenced by current Supreme Court decisions. To discover the position of the Supreme Court on double jeopardy matters, one must look to the opinions of the Court and not to the dissents of Justice Brennan concerning his personal and individual feelings on multiple prosecutions. The Supreme Court in *Brown v. Ohio*, 432 U.S. 161 (1977) reaffirmed the *Blockburger* principle. The Court wrote at page 166:

> "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . .' This test emphasizes the *elements* of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, not withstanding a substantial overlap in

the proof offered to establish the crimes . . .' *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975)."

The Supreme Court's opinion in *Sanabria v. United States*, 98 S.Ct. 2170 (1978) also reaffirms Blockburger in the sense that in evaluating double jeopardy claims the Court will look to the elements of the offense charged. In *Sanabria* the defendant was charged with participation in a single gambling business. The Court looked to the element of the offense, the connection with the single gambling business, to conclude that the government could not retry the defendant on the theory that he participated in the numbers activity of that enterprise after the defendant had been acquitted on the government's theory that he had participated in the horse-betting activity of that enterprise. Thus, in evaluating the instant double jeopardy claim, one must look to the elements of the relevant offenses charged.

One must start this evaluation with the clear understanding that Defendant Garrett was only tried and convicted in Washington for aiding and abetting the importation of marijuana. No amount of rhetorical flourish can change that simple fact of life. Phraseology such as essentially the equivalent, for all practical purposes, and in effect do not change the fact that Defendant Garrett was prosecuted for the substantive offense of importing marijuana alone.

The law is clear that a conspiracy to commit a crime and the crime itself are clearly two separate offenses. Double jeopardy principles do not prohibit prosecution on a conspiracy charge after a defendant has been prosecuted on substantive offenses. *States v. Ballard*, 586 F.2d 1060 (5th Cir. 1978). The Government wishes to especially note that the law sanctions prosecution for a conspiracy after prosecution for the substantive offense in the case where the facts underlying the conspiracy are essentially the same facts which formed the basis for the substantive charge. A fortiori, where the facts underlying the instant continuing criminal enterprise in Count XI are substantially more than the facts underlying the previously prosecuted substantive offense, double jeopardy principles certainly do not bar the instant prosecution.

It is a well-acknowledged proposition that the elements of a substantive offense and a conspiracy are distinct. The Second Circuit as well as the Fifth Circuit follows that analysis. *United States v. Cumberbatch*, 563 F.2d 49 (2nd Cir. 1977). The Court in *United States v. Cruz*, 568 F.2d 781 (1st Cir. 1978) in a post *Abney* decision under an expedited appeal procedure concluded that double jeopardy principles were not violated when a defendant was under indictment for participation in a conspiracy involving the conduct for which he was convicted in another district under Title 21, United States Code, Section 841(a) (1). The defendant had argued unsuccessfully that the circumstances of the two offenses were too closely related to permit successive trials. Thus, again a fortiori, where the facts underlying the instant conspiracies and continuing criminal enterprise are vastly more than the facts underlying the previously prosecuted substantive offense, double jeopardy principles certainly do not bar the instant prosecution.

The doctrine that the elements of substantive offenses and conspiracy differ seems very well settled. The Court in *United States v. Shelton*, 573 F.2d 917 (6th Cir. 1978) permitted prosecution for the substantive violation of the *Hobbs* act after a prosecution for conspiracy of violating the *Hobbs* act was dismissed. Similarly in *United States v. Dunbar,* 591 F.2d 1190 (5th Cir. 1979) the Court permitted prosecution of a doctor for violation of Title 21, United States Code, Section 841(a) (1) following conviction for conspiracy to possess methaqualone with intent to distribute.

The Government contends that prosecution under the present indictment should go forward because double jeopardy principles are not violated by this prosecution. Defendant Garrett cannot argue that the earlier Washington prosecution precludes the resolution of issues in the instant case. To begin with, any issues in the Washington case that would be relevant to the instant matter were resolved against the defendants. The defendant's attempt to rely on the language in *Ashe v. Swenson,* 397 U.S. 436 (1970) strikes the government if we may borrow the language of the Court in *United States v. Cruz, supra* as wishing to ride the language for all it is worth. The defendant in the Fifth Circuit case in *United States v. Marshall,* 513 F.2d 274 (5th Cir. 1975) relied on the opinion of Justice Brennan in *Ashe* to effect that the double jeopardy clause requires the government to join in one trial all the charges against the defendant that grow out of a single criminal act, occurrence, episode or transaction. The Court wrote in response at Page 276:

> "Pared to its real content, his argument is that as a policy matter there should be a single trial of a person with respect to all issues arising out of a single transaction, occurrence, etc. That may be a desirable prosecutorial aim for an overburdened court system faced with a growing volume of cases, but it is not a constitutional imperative. Additionally, the two offenses charged to Dempsey in the present and the previous cases are separate charges requiring distinct elements of proof. We have repeatedly held, and lately reiterated (citation omitted) that the commission of a substantive offense and a conspiracy to commit that offense are separate and distinct that ordinarily a person may be convicted of and sentenced for both."

Defendant Garrett argues Government misconduct in that the Government deliberately delayed filing its conspiracy and continuing criminal enterprise charges until after a conviction had been secured upon Jonathan Garrett.

Defendant Garrett was indicted in the instant case before Jonathan Garrett was sentenced and his conviction finalized. When Jonathan Garrett was fighting his extradition to Florida on this indictment and getting his sentencing in Seattle continued the Government told the Court that it would be glad to try Garrett in Florida and bring him back for sentencing and would prefer that sequence if Garrett's sentencing was continued.

The manner in which the Government reached its decision concering the multi-district enterprise in the instant case is not a proper subject of inquiry by the defendant. The Government is bound by double jeopardy principles, but the defendant has no right in how the Government elects to proceed in complex multi-district cases where the Government does not tread on double jeopardy. See *Rinaldi v. United States,* 434 U.S. 22 (1977); *United States v. Michel,* 588 F.2d 986.

WHEREFORE, the above stated reasons, the Government respectfully requests this Honorable Court both deny the defendant Garrett's motion to dismiss on double jeopardy grounds and find that it is frivolous.

Respectfully submitted,

NICKOLAS P. GEEKER
United States Attorney

/s/ Dana D. Biehl
Special Attorney
Department of Justice
Post Office Box 521
Ben Franklin Station
Washington, D C 20044

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## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

MCR 81-00216

UNITED STATES OF AMERICA
Plaintiff,
vs
JONATHAN GARRETT,
Defendant.

## ORDER

Defendant Jonathan Garrett argues through a Motion to Dismiss that Counts I, II, and XI of the indictment filed against him in the Northern District of Florida on July 16, 1981, subject him to double jeopardy in violation of the Fifth Amendment. The disputed counts contain the following charges: Count I—conspiracy to import marijuana (21 U.S.C. 952, 960, 963), Count II—conspiracy to

possess with intent to distribute marijuana (21 U.S.C. 841, 846), Count XI—engaging in a continuing criminal enterprise (21 U.S.C. 841(a)(1), 843(b), 846, 952, 963, 848).

In an indictment filed March 17, 1981, in U. S. District Court at Seattle, Washington, Jonathan Garrett was charged with: Count II—causing another to travel in interstate commerce to facilitate an unlawful activity [18 U.S.C. 1952(a)(3)(2)], Count III—aiding and abetting importation and importation of marijuana (21 U.S.C. 952, 960(a)(1) and (b)(2), 18 U.S.C. (2), Count IV—possession of marijuana with intent to distribute (21 U.S.C. 841 (a)(1) and (b)(1)(B), 18 U.S.C. (2). Defendant J. Garrett pleaded guilty to Count III of the Seattle indictment and Counts II and IV were dismissed by the Government. Count I of that indictment (conspiracy to import, 21 U.S.C. 952) did not charge Garrett but named him as a co-conspirator.

The substance of Defendant Garrett's double jeopardy argument is that the Government has violated his rights by not bringing all charges against him in a single indictment. That a defendant be subjected to a single trial for all issues arising out of one transaction or occurrence may be a desirable objective, but it is not a constitutional imperative. *U. S. v. Marshall*, 513 F.2d 274 (5th Cir. 1975). Garrett pleaded guilty in Seattle to aiding and abetting importation, a substantive charge. The two other charges dismissed by the Government were also for substantive crimes. He is charged in the Florida indictment with two conspiracy counts and a continuing criminal enterprise count. The law in the Fifth Circuit is clear: there is no bar to first prosecuting a defendant for a crime and then for conspiracy to commit that crime since the offenses are separate and may be tried separately. *U. S. v. Smith*, 547 F.2d 308 (5th Cir. 1978); *U.S. v. Ballard*, 586 F.2d 1060 (5th Cir. 1978); *King v. U.S.*, 565 F.2d 356 (5th Cir. 1978).

I find Jonathan Garrett's double jeopardy claim to be frivolous and plan to proceed with his trial as now scheduled. *U. S. v. Dunbar*, 611 F.2d 985 (5th Cir. 1980).

DONE and ORDERED this 7th day of October, 1981.

/s/ Lynn C. Higby
UNITED STATES DISTRICT
JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

PANAMA CITY CRIMINAL
NO. MCR 81-00216

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JONATHAN GARRETT, et al.,
Defendants.

## VERDICT

### COUNT I

**We, the Jury, find the Defendant, JONATHAN GARRETT, not guilty/*guilty* as charged in Count I (conspiracy to import).**

### COUNT II

**We, the Jury, find the Defendant, JONATHAN GARRETT, not guilty/*guilty* as charged in Count II (conspiracy to possess).**

### COUNT VII

**We, the Jury, find the Defendant, JONATHAN GARRETT, not guilty/*guilty* as charged in Count VII (communications facilities).**

### COUNT VIII

**We, the Jury, find the Defendant, JONATHAN GARRETT, *not guilty*/guilty as charged in Count VIII (communications facilities).**

### COUNT XI

**We, the Jury, find the Defendant, JONATHAN GARRETT not guilty/*guilty* as charged in Count XI (continuing criminal enterprise).**

**So, Say We All, this 30th day of October, 1981.**

**/s/ (Illegible)
FOREPERSON
FILED IN OPEN COURT THIS
October 30, 1981
CLERK, U.S. DISTRICT
COURT, NORTH. DIST. FLA.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Defendant JONATHAN GARRETT MCR 81-00216

November 30, 1981

Counsel [X] with Counsel Paul Komarek

PLEA—[ ] Guilty [ ] Nolo Contendere [X] Not Guilty

## FINDING AND JUDGMENT

There being a finding/verdict of [X] Guilty.

Defendant has been convicted as charged of the offense(s) of in or about the month of January, 1976, up to and including the date of filing of the indictment, conspiring to import into the United States and conspiring to possess with intent to distribute a Schedule I controlled substance, marihuana; and, on or about the same dates, knowingly engaging in a Continuing Criminal Enterprise; and, on or about June 1979, using a telephone to facilitate a felony, all in violation of Title 21, USC, Sections 952, 960, 963, 841, 846, 843(b), 841(a)(1), 848, as charged in Counts I, II, VII, and XI of the Indictment.

## SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, on Count One, and pay a fine to the United States in the sum of $15,000.

On Count Two, the defendant is hereby committed for a term of five (5) years and pay a fine to the United States in the sum of $15,000, with the sentence imposed in Count Two to run consecutively to the sentence imposed in Count One.

On Count Seven, the defendant is hereby committed for a term of four (4) years and pay a fine to the United States in the sum of $15,000, with the sentence imposed in Count Seven to run consecutively to the sentences imposed in Counts One and Two, and consecutively to any sentence being served or hereafter to be served.

On Count Eleven, the defendant is hereby committed for a term of forty (40) years, and pay a fine to the United States in the sum of $100,000, with the sentence imposed in Count Eleven to run concurrently with the sentences imposed in Counts One, Two and Seven, but consecutive to any sentence now being served or hereafter to be served.

As to Counts One, Two, Seven and Eleven, the defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

FILED
November 30, 1981

OFFICE OF CLERK
U.S. DISTRICT COURT
NORTH. DIST. FLA.

/s/ Lynn C. Highby
11/30/81

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE NO. MCR 81-00216

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JONATHAN GARRETT,
Defendant.

## NOTICE OF APPEAL

COMES NOW the defendant, JONATHAN GARRETT, and files his notice of appeal to the United States Court of Appeals, Eleventh Circuit, the judgment and sentence entered on November 30, 1981, as well as the order denying the motion for new trial dated November 30, 1981.

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished by mail, to David L. McGee, Esq., Assistant United States Attorney, P. O. Box 1308, Tallahassee, Florida 32303, and to counsel for all codefendants, this 2nd day of December, 1981.

/s/ Paul G. Komarek,
Jonathan Garrett, Pro Se

By Paul G. Komarek, Esq.
P. O. Box 2334
Panama City, FL 32401
(904) 769-2407
Appointed trial counsel for
Jonathan Garrett filing this
Notice of Appeal on his behalf
only.

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Are we able to consider as evidence against John Garrett the incident on the Indian Reservation in Washington as far as the Conspiracy to Import since there was no mention of it in Count I of the Indictment?

/s/ (Illegible)
Court's EX. NO. 8-A
For Identification ____________
Rec'd in Evidence ____________

Yes, /s/ Lynn C. Higby

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On Count XI:

Does this mean that we find *one* felony under Title 21 and prove Jonathan Garrett committed *it* a series of three times with 5 or more persons and occupied a position of organizer, supervision or any position of management and that he received substantial income or resources from the commission of this *one* felony?

OR

Does this mean we can find any *3* felonies under Title 21 and prove the above?

On Count VII & VIII on J. Garrett & on Count VI on Christopher Garrett we need some guidance. We need the tapes on Count VII & VIII to review.

/s/ (Illegible)

COURT'S EX. NO. 9
For Identification ____________
Rec'd in Evidence ____________

For the continuing criminal enterprise count the Government must prove beyond a reasonable doubt that Jonathan Garrett committed at least any three Title 21 offenses. That would cover the first two elements. The last three elements must also be proven beyond a reasonable doubt. Substantial income may come from one or more of the Title 21 offenses, if any, you find Jonathan Garrett committed.

# RESPONDENT'S

# BRIEF

(5)

No. 83-1842

Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

JONATHAN GARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MARK I. LEVY
*Assistant to the Solicitor General*

JOEL M. GERSHOWITZ
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## QUESTIONS PRESENTED

1. Whether petitioner's prosecution for engaging in a continuing criminal enterprise violated the Double Jeopardy Clause because the government's proof of the predicate offenses included evidence of marijuana smuggling for which petitioner had previously been convicted.

2. Whether cumulative sentences may be imposed for the continuing criminal enterprise offense and substantive predicate offenses.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1842

JONATHAN GARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 727 F.2d 1003.

### JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A petition for rehearing was denied on March 17, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on May 11, 1984, and was granted on October 1, 1984. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count I); conspiracy to possess marijuana with intent to distribute it, in violation of

21 U.S.C. 846 (Count II); use of a telephone to facilitate illegal drug activity, in violation of 21 U.S.C. 843(b) (Count VII); and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count XI). On Counts I and II petitioner was sentenced to consecutive terms of five years' imprisonment and cumulative fines of $15,000. On Count VII he was sentenced to a consecutive five-year term of imprisonment and fined an additional $15,000. On Count XI petitioner was sentenced to a concurrent term of 40 years' imprisonment and fined $100,000. J.A. 94-95.[1] In addition, the district court ordered the forfeiture of petitioner's interest in a yacht. The court of appeals affirmed petitioner's convictions but remanded for a hearing to determine whether petitioner had waived his right to a jury on the forfeiture question (Pet. App. A1-A52).

1. The voluminous evidence at trial, which petitioner does not dispute, is described in detail in our brief in opposition (at 2-6) and need not be repeated here. As the court of appeals summarized, petitioner was "involved in an extensive marijuana importation and distribution operation" (Pet. App. A4). This scheme was "[d]irected primarily by [petitioner and] entailed off-loading, transport and storage of marijuana, as well as meetings and telephone calls, in several states, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas and Washington" (*ibid.*).

2. On March 17, 1981, petitioner was charged in a four-count indictment in the Western District of Washington for violations of federal drug laws arising from marijuana smuggling activity in Neah Bay, Washington (Pet. App. D1-D9; J.A. 3-7). On May 18, 1981, he entered a plea of guilty to one count of importation of 12,000 pounds of marijuana. Petitioner was sentenced to five years' imprisonment and a $15,000 fine. Pet. 5; Pet. App. A4-A5; J.A. 53-55.[2]

Prior to his guilty plea, petitioner filed a motion to consolidate in the Western District of Washington "all charges anticipated, investigated and currently pending against [petitioner]" (J.A. 21). This motion was based on information that petitioner was being investigated on CCE charges in Florida. The government opposed the motion on the ground, inter alia, that no other charges had then been filed against petitioner (J.A. 39), and the district court denied the requested consolidation.

3. a. Approximately two months later, on July 16, 1981, the indictment in the instant case was returned in the Northern District of Florida (Pet. App. E1-E23; J.A. 55-65). Insofar as relevant here, the indictment charged petitioner with conspiring to import marijuana (Count I), conspiring to possess marijuana with intent to distribute it (Count II), using a telephone to facilitate illegal drug activities (Count VII), and engaging in a continuing criminal enterprise (CCE) (Count XI).

Petitioner filed a pretrial motion to dismiss the CCE and conspiracy counts on the basis of double jeopardy (J.A. 66-74). The government opposed dismissal on the ground that the offenses in the Washington and Florida proceedings were not the same (J.A. 84-90), and the district court denied the motion (J.A. 90-92; 9/28/81 Tr. 19, 31, 53).

b. At trial, the government introduced extensive evidence of petitioner's ongoing and widespread drug activities. As part of its case, the government relied on proof of the marijuana smuggling scheme at Neah Bay, Washington.

In its instructions to the jury, the district court defined the elements of the CCE offense (8 Tr. 16-21). In par-

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[1] These sentences are consecutive to the sentence of five years' imprisonment and a $15,000 fine previously imposed in the Western District of Washington for importation of marijuana (see pages 2-3, *infra*).

[2] The plea agreement specifically provided that the United States retained the right to prosecute petitioner for any other offenses he may have committed. See Plea Agreement ¶ 6(c) (May 15, 1981), *United States* v. *Garrett*, No. CR81-62M (W.D. Wash.); 5/15/81 Tr. 10, *United States* v. *Garrett*, *supra*.

ticular, the court advised the jury that, in order to convict petitioner of CCE, it had to find that he had committed "a felony under Title 21 of the United States Code" and that "the commission of the felony under Title 21 was a part of a continuing series of violations" (8 Tr. 16-17). As the court further explained, "the term 'series' generally means three or more, and the term 'continuing' means enduring, subsisting for a definite period or intended to cover or apply to successive, similar occurrences. Therefore, you must find beyond a reasonable doubt that [petitioner] committed three or more successive violations of Title 21 over a definite period of time with a single or substantially similar purpose." *Id.* at 19-20; see also *id.* at 40, 48. In connection with the "felony" and "series" elements, the court informed the jury of the categories of crimes that would suffice under the CCE statute; in addition to those charged as offenses in this case (conspiracy to import marijuana, conspiracy to possess marijuana with intent to distribute it, and telephone facilitation of illegal drug activity), on which the jury had already been instructed (*id.* at 12-18), the court listed possession of marijuana with intent to distribute it, distribution of marijuana, and importation of marijuana (*id.* at 18-19, 21-22). The court did not identify specific criminal acts for the jury to consider as predicate offenses on the CCE count. The jury convicted petitioner on the CCE count as well as two counts of conspiracy and one count of telephone facilitation.

4. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A52). Relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982), the court rejected petitioner's claim that the Florida CCE prosecution in this case violated the Double Jeopardy Clause in light of the previous Washington conviction on the substantive importation charge and the use in the Florida trial of evidence relating to the Washington smuggling activities (Pet. App. A18-A25). The court concluded that there was no successive-prosecution bar to a CCE charge following the defendant's prior conviction for an underlying drug offense.

## SUMMARY OF ARGUMENT

### I.

The main thrust of petitioner's argument seems to be that, because evidence of the substantive Washington importation offense for which he had been previously convicted was introduced in the Florida CCE prosecution, and because in his view the two offenses are the "same" for double jeopardy purposes, the CCE prosecution was barred by the Double Jeopardy Clause. This contention plainly goes too far. Petitioner does not dispute that the CCE prosecution could be maintained if predicated on a series of Title 21 violations for which he had not previously been prosecuted, and the proof at trial here showed many such violations. The Washington offense was therefore by no means indispensable to establishment of the CCE offense; moreover, evidence relating to that offense was surely admissible insofar as relevant to the supervisory role and receipt of income elements of CCE. Accordingly, even if this Court agrees with petitioner's contentions, the most he was entitled to was an instruction precluding the jury from using the Washington offense as one of the predicate offenses satisfying that element of CCE. In fact, however, because CCE and substantive predicate offenses are not the same for double jeopardy purposes, he is entitled to no relief.

A. The constitutional authority to define crimes is vested in the Congress, and the question whether two statutory provisions involve the same offense can be answered only by reference to the crimes that the legislature has established. In determining if two statutory offenses are the same, the Court has generally applied the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932). Where two provisions fail to meet the *Blockburger* test because they contain identical or concentric elements, it is most unlikely that the legislature intended to create separate crimes or that the crimes can be said to be different in any meaningful way. Accordingly, in the traditional context of greater and lesser included offenses, *Blockburger* provides a useful presumption about the relationship between the crimes that the legislature enacted. However, statutory language is not the only basis for analyzing the legislature's action, and the *Blockburger* test should not be applied to the exclusion of such other guides as the history, context, and purposes of the statute.

The application of *Blockburger* as the sole double jeopardy test is particularly problematic in cases where one statutory offense includes as an essential element the commission of any of a number of other offenses—that is, "compound-predicate" offenses. In such cases, the *Blockburger* test is unilluminating as a means of discerning the relationship between the crimes that the legislature defined.

Furthermore, CCE is of a fundamentally different character from the sorts of traditional offenses that have been analyzed under conventional double jeopardy principles. The CCE offense does not result from a single "act or transaction" (*Blockburger*, 284 U.S. at 304) or involve the occurrence of a single crime that gives rise to a greater or compound offense because of the presence of an enhancement factor. Rather, CCE is based on a "series" of violations that is "continuing" in nature. Given this characteristic of CCE as a "compound and multiple predicate" crime, the *Blockburger* test is simply of no utility in assessing whether CCE and the underlying predicates are "the same offense." Instead, the very structure of the statute indicates that they are not. These fundamental differences between CCE and traditional greater-and-lesser or compound-predicate offenses, and the consequences they have for the government's ability to bring a single prosecution that encompasses all of the crimes relating to the continuing criminal enterprise, are critical to the proper double jeopardy analysis in this case.

The dispositive question, therefore, is whether Congress intended CCE to be a separate offense or only an enhanced version of the substantive predicate drug offenses. The answer to that question, based on the text, history, and purposes of the statute, is the former. In its language and structure, CCE does not purport to be merely an aggravated degree of the predicates. Instead, it creates a new crime based on the concept of continuing criminal enterprise. This conclusion is strongly reinforced by the legislative history of CCE, which demonstrates Congress's intent to create a new and separate offense. Finally, the statute was designed to deal with professional criminals and drug "kingpins," and this focus reinforces the common-sense view that being a professional drug trafficker operating an extensive and continuing drug business is different from, and implicates different societal interests than, the individual predicate acts involved.

Thus, in exercising its legislative authority to define crimes, Congress established CCE as a separate offense from the substantive predicate acts. Moreover, that treatment rests on rational grounds reflecting meaningful differences between the two. Accordingly, the successive prosecutions of petitioner pursuant to this statutory scheme did not place him twice in jeopardy for the same offense.

B. Alternatively, even if CCE and the substantive predicates can be viewed as the same offense in some circumstances, that would not bar the CCE prosecution in this case. Where the defendant has not previously been prosecuted for the crime that is the principal felony for the CCE charge, the CCE prosecution does not violate his double jeopardy rights. The issue may be analogized to that presented by a recidivist or habitual offender statute. This Court has long held that the Double Jeopardy Clause does not prevent the use of previously prosecuted offenses to enhance the gravity of a new charge against the defendant. Similarly, a defendant has no double jeopardy interest that is infringed by the introduction at the CCE trial of evidence relating to a substantive crime that was the subject of a prior prosecution, provided that such evidence does not serve to establish the principal felony for the CCE count. In neither event is the defendant put twice in jeopardy for the same offense, and he has no constitutionally protected interest in avoiding the use of previously prosecuted offenses in connection with a new charge for which he had not before been tried.

Because petitioner was convicted in the Florida proceeding of other offenses that satisfy the principal felony requirement, the use of evidence concerning the Washington smuggling activity did not render the Florida CCE trial violative of the Double Jeopardy Clause.

C. In any event, because all of the charges against petitioner could not reasonably have been brought in one proceeding, the Double Jeopardy Clause did not bar successive prosecutions.

First, venue over the Washington and Florida non-CCE offenses did not lie in a single district, and therefore those charges could not have been brought in one proceeding. In this circumstance, petitioner's double jeopardy argument should be rejected because it would require the government either to refrain from presenting its complete case on the CCE charge or, as the price for introducing all of its evidence, to forgo prosecution on one or more of the substantive offenses entirely. The Double Jeopardy Clause does not entitle defendants to such an unjustifiable windfall.

Second, even apart from venue obstacles, successive prosecutions should not be barred where, in light of the facts of the offenses and the government's investigation and evidence, valid reasons existed for not bringing the charges in one proceeding. Here, although the relevant facts have not yet been developed in the record, the government might have had substantial reasons for declining to bring the CCE charge at the time of the Washington proceeding and hence should not be held to have been required by the Double Jeopardy Clause to pursue a CCE count in that case or not at all. To the extent the Court deems these facts to be material, it should remand for a factual hearing in the district court in light of the legal principles that the Court announces.

II.

Petitioner's cumulative sentences on the Washington importation charge and the Florida CCE charge are not invalid. The issue whether cumulative penalties may be imposed is strictly a matter of legislative intent. As discussed in connection with the question of successive prosecutions, Congress intended CCE and substantive predicates to be separate offenses, and it sought to deal especially severely with the professional drug traffickers at whom the CCE statute was aimed. Moreover, to prohibit cumulative sentences would lead to irrational results that Congress could not have intended. In these circumstances, legislative authorization for cumulative punishments clearly exists.

Nor is this conclusion inconsistent with the plurality opinion in *Jeffers* v. *United States*, 432 U.S. 137, 154-158 (1977). *Jeffers* held that Congress disallowed cumulative sentences for CCE and a conspiracy. However, in *Jeffers* the conspiracy was not used as a predicate offense but instead was viewed as necessarily subsumed in CCE by virtue of the statutory structure regardless of which offenses served as predicates. *Jeffers* does not control the quite different issue presented here of whether cumulative sentences are foreclosed for CCE and substantive offenses simply because the substantive offense is used as a predicate for the CCE charge.

## ARGUMENT

### I. PETITIONER'S CONVICTION ON A SUBSTANTIVE DRUG CHARGE IN WASHINGTON DID NOT BAR, ON DOUBLE JEOPARDY GROUNDS, HIS SUBSEQUENT PROSECUTION ON THE CONTINUING CRIMINAL ENTERPRISE CHARGE IN FLORIDA

As the Court has stated, the Double Jeopardy Clause

> consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after con-

> viction. And it protects against multiple punishments for the same offense.

*North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). Invoking the second of these protections, petitioner contends that the CCE prosecution in Florida was barred by the Double Jeopardy Clause. He argues that, because CCE is predicated on a series of drug violations and because evidence was introduced in the Florida proceeding that related to the substantive importation offense to which he had previously pleaded guilty in Washington, the Washington charge constitutes a lesser included offense of the CCE count and therefore his conviction on the Washington charge foreclosed the subsequent prosecution for the greater offense of CCE.[3]

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[3] We acknowledge that evidence of the marijuana smuggling at Neah Bay, Washington, was introduced among numerous drug activities proved as part of the government's case on the CCE offense at the Florida trial. We cannot agree, however, with petitioner's characterization (Br. 15) that the government "heavily relied" on the Neah Bay evidence as an "integral piece" of the prosecution. As petitioner's own recitation of the evidence makes clear (Br. 15-20), the Washington smuggling episode did not constitute a major portion of the extensive proof of petitioner's guilt presented during the eight-day Florida trial and reflected in the 1800-page trial transcript.

In addition, we note that petitioner was convicted of three predicate offenses in the Florida proceeding, and therefore the substantive Washington offense was not an essential part of the government's proof on the CCE count. See also pages 37-38 & note 31, *infra*. Thus, whatever the relation between CCE and substantive predicate offenses in general, in this case the Washington offense is not a necessary predicate for the CCE conviction. Rather, in its present posture, the case is no different than if evidence of the Washington offense had not been introduced in the Florida trial. See Br. in Opp. 9-10; see also *United States* v. *Sterling*, 742 F.2d 521, 526 (9th Cir. 1984); *United States* v. *Webster*, 639 F.2d 174, 181 (4th Cir.), cert. denied, 454 U.S. 857 (1981) and 456 U.S. 935 (1982). Accordingly, even if petitioner is correct that CCE and substantive predicates can be "the same offense" in some circumstances, it would not follow that his CCE conviction in this case should be reversed.

With respect to the constitutional protection against reprosecution following a conviction for the same offense, the Court has explained that "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). In this context, the double jeopardy "guarantee serves 'a constitutional policy of finality for the defendant's benefit' * * * [that] protects the accused * * * from attempts to secure additional punishment after a prior conviction and sentence." *Brown* v. *Ohio*, 432 U.S. 161, 165-166 (1977) (citations omitted). See also *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-169 (1873). As one commentator has illustrated the principle:

> [T]he rule prohibiting reprosecution after a conviction denies the prosecutor * * * control over punishment. Without the rule the prosecutor could continue to prosecute until he found a judge willing to give an "appropriate" sentence. And if the subsequent judge imposed his sentence cumulatively the defendant would be punished twice for the same offense. The double jeopardy rule forces the prosecutor to accept the first judge's decision on sentencing * * *.

Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 278 (1965).[4]

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[4] As the Court has recognized, different policies come into play if the reprosecution follows an acquittal rather than a conviction for the same offense. "When a defendant has been acquitted of an offense, the [Double Jeopardy] Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *United States* v. *Wilson*, 420 U.S. at 343, quoting *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). See also, *e.g.*, *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 5; *Swisher* v. *Brady*, 438 U.S. 204, 215-217 (1978). Because petitioner was convicted (pursuant to his guilty plea) of the substan-

By its terms, however, the Double Jeopardy Clause "is not properly invoked * * * unless the 'same offense' is involved in both the first and the second trials." *United States* v. *Ewell*, 383 U.S. 116, 124 (1966).[5] Thus, the Double Jeopardy Clause does not bar successive prosecutions for different offenses even where much of the same evidence would be introduced at the two proceedings and many of the same issues litigated.[6]

In light of this settled principle, petitioner does not and could not dispute that he was properly subject to separate prosecutions in Washington and Florida for the substantive crimes committed in those districts. Likewise, he does not contest that he could be prosecuted in Florida for conspiracy to import or to possess marijuana, in violation of 21 U.S.C. 846 and 963, notwithstanding that the smuggling activity involved in the Washington indictment occurred in furtherance of that conspiracy. Petitioner also does not argue that the CCE charge in Florida would have been impermissible if the Neah Bay evidence had not been introduced at trial.[7]

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tive charge in Washington, these considerations do not bear on the double jeopardy issue here.

Moreover, contrary to petitioner's repeated but cryptic allusions (Br. 8-9, 24-26, 27, 29), this case does not involve a "unit of prosecution" issue; the government did not divide a single continuing criminal enterprise into several sub-enterprises for purposes of prosecution and punishment.

[5] Of course, the doctrine of collateral estoppel would be applicable even if the offenses are not the same. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Because petitioner pleaded guilty in the Washington proceeding, collateral estoppel has no bearing on the validity of the CCE prosecution in Florida. See *Sanabria* v. *United States*, 437 U.S. 54, 73 n.31 (1978).

[6] See *Gavieres* v. *United States*, 220 U.S. 338 (1911); *Borchardt* v. *United States*, cert. denied, No. 83-1643 (Oct. 29, 1984), slip op. 4, 5 n.3 (Brennan, J., dissenting); *Thompson* v. *Oklahoma*, cert. denied, 429 U.S. 1053 (1977) (Brennan, J., dissenting). For example, in *Gore* v. *United States*, 357 U.S. 386 (1958), the Court upheld the imposition of cumulative sentences for three separate offenses arising out of a single sale of drugs. Although *Gore* involved the question of multiple punishments at one proceeding, we believe it clear, under established double jeopardy principles, that successive prosecutions for each of the separate offenses also would be permissible even though the evidence and factual issues at the trials would substantially overlap.

Accordingly, in resolving petitioner's double jeopardy claim, the threshold question is whether in this case the crime of importation of marijuana, to which petitioner pleaded guilty in Washington, and the crime of engaging in a continuing criminal enterprise, of which petitioner was convicted in Florida, are the same offense for purposes of the constitutional protection against successive prosecutions. It is to that issue that we first turn.

Before doing so, however, a preliminary word about remedies is in order. The relief petitioner seeks is a ruling barring prosecution on the CCE charge. But such relief would clearly be inappropriate here. Quite apart from the Washington importation charge, the evidence at trial was sufficient to establish numerous other Title 21 offenses committed by petitioner in the course of his drug enterprise, and petitioner does not contend that a CCE prosecution based on a series of violations other than the Washington smuggling would be barred by double jeopardy. Nor does anything in the law or in petitioner's arguments support any suggestion that evidence of the Washington offense would be inadmissible at the Florida CCE trial to prove the number-of-participants, supervisory role, or receipt-of-substantial-income elements of the CCE offense. Therefore, even if petitioner is right in his contentions and our arguments that follow are rejected by this Court, the most petitioner was entitled to at trial was an instruction to the jury limiting the use to which the Washington evidence could be put and directing it not to rely on that offense as one of the CCE predicates, neither of which petitioner ever requested. And, on review of his convictions, the most petitioner could properly receive is a new trial subject to such restrictions. Even that relief is available only if the reviewing court concludes that the arguendo erroneous use that may have been made of the Washington offense was not harmless error (see page 10 note 3, *supra*).

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[7] See *United States* v. *Chagra*, 653 F.2d 26 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982) (double jeopardy does not bar successive prosecutions for CCE and other drug offenses where those offenses could have been, but were not, used to prove the CCE charge); see also *United States* v. *Oberski*, 734 F.2d 1030, 1033 (5th Cir. 1984); *United States* v. *Samuelson*, 697 F.2d 255, 260 (8th Cir. 1983); *United States* v. *Middleton*, 673 F.2d 31, 33 (1st Cir. 1982); *United States* v. *Phillips*, 664 F.2d 971, 1008 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982).

### A. Because CCE And The Substantive Importation Violation Are Not "The Same Offense," Successive Prosecutions Were Not Impermissible

1. This Court has long recognized that the Constitution entrusts to Congress the authority "to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).[8] Pursuant to that authority, "[t]he legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments." *Brown* v. *Ohio*, 432 U.S. at 165. Accordingly, in determining whether two offenses are the same for purposes of the bar against successive prosecutions, the Double Jeopardy Clause focuses on the statutory definitions of the crimes enacted by the legislature. See *Illinois* v. *Vitale*, 447 U.S. 410, 415-419 (1980); *Brown* v. *Ohio*, 432 U.S. at 166; see also *Thigpen* v. *Roberts*, No. 82-1330 (June 27, 1984), slip op. 3-7 (Rehnquist, J., dissenting). The constitutional protection against successive prosecutions ensures that, once the legislature has specified criminal offenses, "prosecutors ordinarily * * * not attempt to secure * * * punishment [for the same offense] in more than one trial." *Brown* v. *Ohio*, 432 U.S. at 165.

The question whether two statutory provisions involve "the same offense" can properly be answered only by reference to the substance and character of the crimes

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[8] See also *Ohio* v. *Johnson*, slip op. 6; *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 15 n.18; *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 689 (1980); *Sanabria*, 437 U.S. at 69.

that the legislature has established. In the successive prosecution context, the Court traditionally has applied the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to decide if two offenses are the same:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

See *Illinois* v. *Vitale*, 447 U.S. at 416; *Brown* v. *Ohio*, 432 U.S. at 166; *Gavieres* v. *United States*, 220 U.S. 338, 342-344 (1911).[9]

We agree that the *Blockburger* test is often a useful standard in evaluating whether statutory provisions involve the same or different offenses. Where the legislatively prescribed crimes contain identical elements, or where one crime is entirely subsumed in the other, it is sensible to regard them as the same offense for constitutional purposes. In those circumstances, it is most unlikely that the legislature intended to create separate crimes or that in any meaningful way—for example, in terms of the history and purpose of the provisions and the social policies they are designed to further—the crimes can be said to be different. See *Whalen* v. *United States*, 445 U.S. 684, 691-692 (1980); *id.* at 713-714 (Rehnquist, J., dissenting). Thus, *Blockburger* provides a workable presumption about the relationship between the crimes that the legislature enacted. And where the relationship identified by *Blockburger* is present, the constitutional conclusion follows that the offenses are the same under the Double Jeopardy Clause.

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[9] In applying *Blockburger* to the statutory elements, a court is not limited to the literal language of the provisions but instead may construe them in accordance with the usual rules of interpretation. We take this to be the meaning of *In re Nielsen*, 131 U.S. 176 (1889). There, the Court held that double jeopardy barred successive prosecutions for the federal crimes of cohabitation and adultery in the Territory of Utah. Although the statutory elements of the offenses appeared on their face to be different, the Court construed adultery to be a lesser included offense of cohabitation (131 U.S. at 187-189); as the Court summarized, "the adultery charged in the second indictment was an incident and part of the unlawful cohabitation" and the cohabitation offense "included the adultery charged" (*id.* at 186-187). Because "a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one" (*id.* at 189), the Court concluded that, as it construed the offenses, the defendant's conviction of cohabitation precluded the later adultery prosecution.

But, as in other areas of the law, statutory language is not the only indication of what the legislature has done. Such considerations as the structure of the statute, its context and history, and the societal interests and objectives underlying it, all shed light on the substance and character of the legislation. We do not believe that the *Blockburger* test can soundly be applied to exclude these and other like guides that are relevant to understanding the legislative action.

This does not mean that a legislature, merely by the expedient of labeling two offenses as separate, can frustrate the constitutional protection against successive prosecutions for the same offense. To take an example, a legislature's designation of armed robbery and robbery as "separate" offenses would not make them so for double jeopardy purposes. Of course, legislatures do not act in such an unreasonable and arbitrary manner. But even if they did, we cannot conceive of the considerations that could withstand judicial scrutiny in order to support the conclusion that the offenses are, in any rational and substantial sense, different. The fundamental safeguards of the Double Jeopardy Clause are well established, and we do not suggest that a legislature bent on such an end could circumvent those principles simply by its own ipse dixit.

In addition, even if *Blockburger* were the sole and constitutionally-required double jeopardy test for analyzing traditional greater and lesser offenses, it is not useful for evaluating cases involving so-called "compound-predicate" offenses—that is, where an element of one offense (the compound offense) is the commission of any

of a number of other offenses (the predicate offense). Unlike traditional greater and lesser offenses, where "proof of the greater necessarily entails proof of the lesser," compound-predicate offenses exist where "one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present." *Whalen*, 445 U.S. at 708-709 (Rehnquist, J., dissenting). In the case of such offenses, the

> multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of [the compound offense] and the *statutes defining* the various predicate felonies, *Blockburger* would always * * * [be satisfied], since no particular felony is ever "necessarily included" within * * * [the compound offense]. If, on the other hand, one looks to the *facts alleged in a particular indictment* * * *, then *Blockburger* would * * * [not be met], since proof of the * * [compound offense] would necessarily entail proof of * * * [the particular predicate offense alleged].

*Id.* at 709 (emphasis in original). Thus, "the *Blockburger* test, although useful in identifying statutes that define greater and lesser offenses in the traditional sense, is less satisfactory and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate' offenses. * * * [W]hen applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties." *Id.* at 708, 712. In a real sense, compound-predicate offenses by their nature both pass and fail the *Blockburger* test simultaneously.

The problems of analysis created by such offenses are best resolved not by the application of an abstract—and for these purposes essentially empty—formula, but by a concrete examination of legislative design and purpose. Suppose, for example, in the case of a felony-murder statute, the history demonstrates that the legislature intended the offense to be an aggravated form of the underlying felony, and that the approach of adopting a single statute was chosen as a matter of efficiency and concision in lieu of a series of enhanced felony provisions. Then, for constitutional purposes, the offenses of felony-murder and the predicate felony would be the same, and successive prosecutions would be barred. Cf. *Whalen*, 445 U.S. at 693-694 & n.8. The mere fact that the legislature gave them different names would not change the matter; a label alone cannot alter the conclusion that there is no substantive and rational reason for treating a felony and an aggravated form of the felony as different offenses under the Double Jeopardy Clause.

On the other hand, to the extent that the legislature intended felony-murder to be a homicide offense instead of an aggravated felony and utilized the underlying felony only to establish the requisite intent for murder, the murder and the felony would be separate offenses. Moreover, as in the case of other forms of homicide and the particular felony in question, there would be a substantive and rational basis for the distinction: the felony-murder offense addresses the societal interest in deterring and punishing killing, while the underlying felony serves the quite separate purpose of deterring and punishing the particular non-homicide violation.[10]

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[10] We recognize that in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Payne* v. *Virginia*, No. 82-6935 (July 5, 1984) (per curiam), the Court held that a defendant could not be prosecuted on the felony charge after he had been prosecuted and convicted of felony-murder. The basis for the Court's decisions is not entirely clear. To the extent they rest on the premise that felony-murder is an aggravated form of the felony, as in *Whalen*, 445 U.S. at 693-694 & n.8, the conclusion that the Double Jeopardy Clause does not permit them to be tried in successive proceedings follows logically. Insofar, however, as the Court implicitly concluded that felony-murder and the predicate felony are necessarily the same offense irrespective of legislative intent or that they may not be successively prosecuted even if they are different offenses,

The foregoing analysis is applicable to the CCE offense. Because CCE requires, among other things, that the defendant commit a felony under the Drug Act and that such felony be part of a continuing series of violations under the Act, it is a type of a compound-predicate offense. For the reasons discussed above, the *Blockburger* test is unilluminating on the question whether CCE and the underlying crimes are the "same" or "different" offenses.

Finally, whatever mode of analysis is applicable to traditional greater-and-lesser offenses (such as murder and manslaughter) or conventional compound-predicate offenses (such as felony-murder and the underlying felony), a different approach is necessary for CCE. In contrast to those offenses, CCE does not involve a more or less discrete act or transaction that occurs at a given time and in a given place. Rather, as its elements indicate, CCE is based on a "series" of drug violations; it arises out of a "continuing" course of criminal conduct that can run over an extended period; and it is directed at "organizer[s]," "supervisor[s]," or "manager[s]" of large-scale drug schemes that involve five or more people

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we believe that these decisions, which were rendered without full briefing and oral argument, should be re-examined.

Similarly, in *Illinois* v. *Vitale*, *supra*, the defendant was charged in successive prosecutions with failure to reduce speed to avoid an accident and involuntary manslaughter. The Court considered these charges to involve either traditional greater-and-lesser offenses (447 U.S. at 416-420) or compound-predicate offenses (*id.* at 420-421); if the latter, the Court stated that under *Harris* v. *Oklahoma* the defendant would have a "substantial" claim of double jeopardy (447 U.S. at 420, 421) in the event that the state used the failure to slow as a necessary part of its manslaughter case. Again, as in *Harris* itself, the Court's discussion may be seen to rest on the premise that the compound offense of involuntary manslaughter was an aggravated form of the predicate offense of failure to reduce speed and therefore was "the same offense" for successive prosecution purposes. Indeed, the Court in *Vitale* explained *Harris* in precisely this way, noting that it had "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense" (447 U.S. at 420).

and can entail widely changing personnel during the life of the enterprise. Thus, CCE may be termed a "compound and multiple predicate" offense. Where, as in CCE, the compound offense structurally involves a number of predicate acts that import a durational dimension into the statute, neither *Blockburger* nor any other test that rests on the concept of "the same act or transaction" (284 U.S. at 304) affords a workable tool for double jeopardy analysis. Instead, the very framework of the statute shows that CCE and the substantive predicates are not "the same offense."

These features of CCE are not merely technical reasons for dispensing with the *Blockburger* test here, but rather indicate a fundamental distinction between the issue in this case and other double jeopardy problems. Because a continuing criminal enterprise often involves a widespread scheme of criminal activity in which a large number of people participate over a long period, the task of investigating and prosecuting a CCE case is exceedingly complex. Various predicate crimes can occur in different venues and at different times, and a constantly varying group of participants may be implicated in only some of the underlying violations. Hence, it is a formidable undertaking for the government to bring a case in a single jurisdiction that embraces the entirety of the charges against numerous defendants who were engaged in different facets of sweeping and ongoing criminal activity. These problems for the prosecution of the compound and multiple-predicate crime of CCE stand in dramatic contrast to the prosecution of traditional greater-and-lesser or compound-predicate offenses. Such offenses occur within reasonably well-defined temporal and geographical limits, the participants do not fluctuate or become implicated in only a part of the illegal conduct, and all of the charges against all of the defendants can usually be joined in one venue.

Hence, CCE is inherently of a very different stripe from traditional greater-and-lesser and compound-predicate offenses, and double jeopardy principles developed in those areas—which are designed to accommodate the public's right to effective law enforcement and the defendant's right to avoid unnecessary proceedings—cannot be mechanically transposed to CCE. The practical consequence of petitioner's argument would be to impair the compelling governmental interest in combating drug trafficking: either the government will be substantially hampered in bringing CCE charges against major offenders who were previously prosecuted on drug counts (and perhaps counts that were brought even before the government knew that the defendant was subject to CCE), or it will have to refrain from prosecuting known drug violators if it wishes to avoid the risk that such a prosecution would in effect immunize the defendant from later charges involving the more serious CCE offense. In either event, one of the statutes enacted by Congress may be essentially nullified in practice. If petitioner's construction of the Double Jeopardy Clause is adopted, the government will be significantly hindered in enacting and enforcing complex criminal statutes such as CCE.[11]

2. The decisive question, then, is whether Congress intended CCE to be a separate offense or only an enhanced version of the substantive predicate drug offenses. We submit that Congress's intent was the former and that such treatment reflects substantial and rational differences between CCE and the other drug provisions.

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[11] We note that, in line with this analysis, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar successive prosecutions for the predicate acts of racketeering and the compound offense of conducting the affairs of an enterprise through a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* See *United States* v. *Licavoli*, 725 F.2d 1040, 1050 (6th Cir. 1984), cert. denied, No. 83-1657 (June 18, 1984); *United States* v. *Boffa*, 688 F.2d 919, 938 (3d Cir. 1982), cert. denied, 460 U.S. 1022 and 1028 (1983); *United States* v. *Phillips*, 664 F.2d at 1009 n.55; *United States* v. *Hawkins*, 658 F.2d 279, 287-288 (5th Cir. 1981); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

Accordingly, CCE and the substantive predicate offenses are not the same, and the successive prosecutions of petitioner for those separate offenses were not impermissible.

The CCE statute proscribes "engag[ing] in a continuing criminal enterprise." 21 U.S.C. 848(a). A person engages in a continuing criminal enterprise if the following elements are met. First, under Section 848(b)(1), the defendant must violate a felony provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*) (the Drug Act).[12] Second, under Section 848(b)(2), that felony must be part of a continuing series of violations of the Drug Act;[13] the series of violations must be undertaken by the defendant in concert with five or more other people; with respect to those people, the defendant must occupy a position of organizer, a supervisory position, or any other position of management; and the defendant must obtain substantial income or resources from the series of violations.

In light of this structure, we believe CCE may be viewed, as a matter of statutory construction, in one of three ways. First, it could be understood to be a punishment scheme that provides a greater penalty for the principal felony when the conditions specified in the statute are satisfied; in this view, CCE would constitute a sentence enhancement provision rather than a substantive criminal offense. Second, it could be considered to be an aggravated form of the principal felony, which arises when the other statutory elements are proven; under this approach, CCE would be a substantive offense that is an enhanced degree of, rather than a distinct offense from, the principal felony. Under either of these interpretations of the statute, the Double Jeopardy Clause would bar successive prosecutions for CCE and the principal

felony.[14] In contrast, the third possible construction is that CCE is a new and separate offense that is different from the predicate felony, in which event separate proceedings on CCE and the principal felony would not violate double jeopardy. We submit that the language and structure of the statute, together with its history and purpose, demonstrate that Congress intended CCE to be a new and separate offense.

On its face, the CCE statute does not appear to be a sentence enhancement provision; on the contrary, it clearly establishes a substantive offense. First, rather than consisting solely of punishment provisions, the statute reads in terms of a standard of conduct and proscribes "engag[ing] in a continuing criminal enterprise" as that concept is defined in Section 848(b). In addition, the statute expressly refers to "convictions * * * under this section" and to persons "convicted under [this section] of engaging in a continuing criminal enterprise" (21 U.S.C. 848(a)(1) and (2)), which also indicate the substantive nature of CCE. Moreover, the penalties in the CCE statute do not refer to and are not based on the penalties for the underlying offenses, as might be expected if CCE were intended merely to be a mechanism for enhancing punishment. Compare 21 U.S.C. 841(b)(1)(A), 849.[15]

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[12] We shall refer to this element as "the principal felony."

[13] The "series" element of CCE has been construed to require at least three drug offenses. See, *e.g.*, *United States* v. *Sterling*, 742 F.2d at 525-526; *United States* v. *Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983), cert. denied, No. 83-1669 (Oct. 1, 1984); *United States* v. *Chagra*, 653 F.2d at 27-28; see also 8 Tr. 17, 19-20.

[14] We remind the Court that even this conclusion, which we argue below does not reflect a proper interpretation of the statute, would not impugn petitioner's CCE conviction, since it did not depend on use of the Washington offense as the principal felony. Indeed, even if this view of the statute were expanded to make CCE an enhanced punishment provision for or aggravated version of all offenses in the series required by CCE, the Washington offense was not necessary here to establish the series of offenses supporting petitioner's CCE conviction.

[15] In *United States* v. *Jefferson*, 714 F.2d 689, 702-703 (7th Cir. 1983), the court relied on the legislative history of CCE to construe the statute, in the context of a multiple punishment issue, to be "a method of sentence enhancement" (714 F.2d at 702) that provides "a comprehensive and exclusive penalty structure" (*id.* at 703). In view of the statutory language discussed in the text

In much the same way, we do not think CCE can properly be understood to be simply an aggravated or enhanced form of the principal felony. Nothing in the statute purports to establish a higher degree of the underlying felony that is alleged. Quite the opposite, the statutory offense is premised on a new concept of continuing criminal enterprise. While the term "enterprise" is not one on which the jury must be separately instructed,[16] the statutory formulation in terms of a criminal enterprise belies the notion that CCE is merely an aggravated form of the predicate felony. Similarly, in its structure, the CCE statute does not start with a basic felony and increase its severity by the addition of a further element, as is the norm for aggravated offenses such as bank robbery and armed bank robbery or assault and assault with intent to kill; rather, CCE, while requiring the commission of the principal felony, adds a number of other elements—that there be a series of violations, that the violations be undertaken by the defendant in concert with five or more people, that the defendant act as an organizer, supervisor, or manager, and that he obtain substantial income or resources from the violations—that fundamentally fix the character of CCE as a new offense rather than an enhancement of some other offense. In the end, the statute does not easily lend itself to a reading that makes the continuing criminal enterprise offense an aggravated version of basic drug felonies such as distribution or importation.[17]

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and the legislative history discussed below, we believe that construction of CCE is in error. (The multiple punishment issue is discussed in Part II, *infra.*)

[16] The CCE offense is defined by the elements prescribed in the statute and does not require proof of an "enterprise" apart from the continuing series of violations that are undertaken by the defendant as an organizer or supervisor in concert with five or more other persons and that produce substantial income or resources. See, *e.g.*, *United States* v. *Sinito*, 723 F.2d at 1262.

[17] In *United States* v. *Lurz*, 666 F.2d 69, 75-77 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 457 U.S. 1136, and 459 U.S. 843 (1982), the court construed CCE to be a compound form of the

These conclusions about the nature of CCE are strongly reinforced by the history and purpose of the statute. CCE was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*[18] As initially proposed by the administration, the bill did not contain a CCE provision. See S. 2637, 91st Cong., 1st Sess. (1969). Following hearings, the Senate Committee on the Judiciary reported a clean bill, S. 3246, 91st Cong., 1st Sess. (1969), which was generally the same as the administration's proposal but revised the penalty provisions both of the proposed legislation and of existing law. See S. Rep. 91-613, 91st Cong., 1st Sess. 1-2, 97-136 (1969); 115 Cong. Rec. 39253 (1969) (remarks of Sen. Dodd); 116 Cong. Rec. 1671 (1970). S. 3246 contained a section (§ 509) entitled "[c]ontinuing criminal enterprises," which had been offered in committee by Senator Tydings. See 115 Cong. Rec. 40050 (1969). Despite its title, however, Section 509 of the bill was not in substance the CCE provision eventually adopted but rather was a sentence enhancement provision that was ultimately enacted as the dangerous special drug offender (DSDO) section in 21 U.S.C. 849.

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principal felony, and it therefore held that a defendant could not be successively prosecuted for that felony and CCE. At the same time, the court ruled that previously prosecuted offenses could be used to prove the remaining elements of CCE, including the continuing series of violations (other than the principal felony), since those elements are not the gravamen of the offense but instead serve as circumstances that increase the degree of severity of the principal felony. While we agree with that double jeopardy analysis of the statute as construed by the court (see Part I(B), *infra*), for the reasons stated in the text we do not agree with the construction that CCE is only an aggravated form of the principal felony.

[18] The relevant background of the Act is summarized in H.R. Rep. 91-1444, 91st Cong., 2d Sess., Pt. 1, 1-2 (1970), and Staff of the House Comm. on Ways and Means, 91st Cong., 2d Sess., *Comparison of Bills to Regulate Controlled Dangerous Substances and to Amend the Narcotic and Drug Laws* 1-2 (Comm. Print 1970).

Like the original bill in the Senate, the administration bill introduced in the House had no CCE provision. After hearings, a new bill was introduced as H.R. 18583, 91st Cong., 2d Sess. (1970). H.R. 18583 contained a section (§ 508) that, as with its Senate counterpart, was entitled "continuing criminal enterprises" but in reality was the DSDO enhanced sentencing provision.

Thereafter, the House Committee on Interstate and Foreign Commerce deleted this provision and, as proposed by Representative Dingell, replaced it with the CCE section (§ 408 of the revised bill) that was subsequently passed as 21 U.S.C. 848. See H.R. Rep. 91-1444, 91st Cong., 2d Sess., Pt. 1, 5, 10, 50 (1970); *id.* at 81-85 (additional views). The Committee then reported H.R. 18583 with the CCE provision and without the DSDO provision. See H.R. Rep. 91-1444, *supra*. On the House floor, Representative Poff introduced an amendment to restore the DSDO provision, now explicitly called the "dangerous special drug offender sentencing" provision (§ 409), that had been eliminated in committee. See 116 Cong. Rec. 33628 (1970). The House adopted the Poff amendment (*id.* at 33634) and passed H.R. 18583 containing both the CCE and the DSDO provisions (*id.* at 33667). In substantially that form, the House bill was passed into law;[19] in particular, the CCE provision in 21 U.S.C. 848 and the DSDO provision in 21 U.S.C. 849 were enacted from the House bill.

The legislative history of the Dingell amendment demonstrates that Congress intended CCE to be a new offense separate from, and not merely an enhanced sentencing mechanism for or aggravated form of, any predicate offense. For example, in describing the Dingell CCE provision, the House Report explained that "any person who *engages in a continuing criminal enterprise* shall upon *conviction for that offense* be sentenced to [the specified penalties]" and that "[i]f the person engages in this activity subsequent to one or more prior *convictions under this section*, he shall receive [the greater recidivist

penalty provided in CCE]." H.R. Rep. 91-1444, *supra*, at 50 (emphasis added); see also *id.* at 10. This discussion clearly indicates that CCE is a criminal offense rather than a sentencing enhancement mechanism and that the offense consists of a violation of the CCE statute rather than simply constituting an aggravated violation of a predicate offense statute. Furthermore, the additional views submitted by Representative Dingell and others explaining the CCE amendment explicitly stated that "[i]nstead of providing a postconviction—presentencing procedure [as the DSDO provision does, the Dingell amendment] made engagement in a continuing criminal enterprise *a new and distinct offense* with all its elements triable in court." *Id.* at 84 (emphasis added).

The debate on the Poff amendment restoring the DSDO provision also reveals that CCE was intended to be a new and distinct offense. In discussing the Poff proposal, Representative Eckhardt explained that "the committee decided that the Dingell amendment should be chosen over the original language [which was reintroduced by the Poff amendment because] * * * the Dingell amendment created a new offense which would have to be triable in all its parts by admissible evidence brought before the court * * *." 116 Cong. Rec. 33302 (1970). Representative Eckhardt later reiterated that explanation, noting that under the Dingell amendment "there was an original crime described * * * [whose] elements would have to be proved in the court" and that "the treatment of this matter [under CCE would be] as an individual, separate, provable crime in court [rather] than treatment of it [under DSDO] in a sort of quasi-criminal process for enhanced sentencing" (*id.* at 33627).

In addition, and of particular significance, Representative Poff, in offering his amendment, explained the fundamental difference between the CCE and DSDO provisions (116 Cong. Rec. 33630 (1970) (emphasis added)):

> Mr. Chairman, we need special penalties in my opinion for these special criminals. Constitutional scholars have suggested two approaches to deal with

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[19] See H.R. Conf. Rep. 91-1603, 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 33667, 35559, 36653, 36885, 37439 (1970).

> such offenders. The first is the *creation of a separate crime with separate penalties.* The second approach is the imposition of longer sentences upon those convicted first of the basic crime and then shown to be dangerous offenders.
>
> Mr. Chairman, the first approach, *the separate crime approach,* is the approach taken by section 408 of the committee bill [the Dingell amendment]. The second is found in the amendment which I have just offered * * *.
>
> * * * [Under the Poff amendment, the] jury hears only evidence concerning *the basic crime* which has been charged. If the jury convicts on that basic charge, then the judge, in the absence of the jury, determines whether the accused is a special dangerous offender and, if so, fixes *a special penalty commensurate with the offense as aggravated by the special dangerous offense.*[[20]]

Representative Poff further stated that the Dingell provision "embodies a new separate criminal offense with a separate criminal penalty" whereas "[m]y amendment does not define a separate criminal offense. Rather it authorizes the judge to impose the extended sentence upon the defendant in the dock who has already been found guilty by the jury of the basic charge" (*id.* at 33631). Other Representatives also referred to this difference between the separate CCE offense and the DSDO enhanced sentencing provision. See, *e.g., id.* at 33631-33633 (remarks of Rep. Eckhardt); *id.* at 33632 (remarks of Rep. Springer). In the end, over Representative Eckhardt's objections to the fairness and validity of the DSDO sentencing procedure, the House accepted the Poff amendment.

This history confirms that Congress intended CCE to be a distinct and independent offense. The reports and debates refer time and again to CCE as a new and separate offense for which convictions could be obtained and penalties imposed. A construction of CCE as a sentence-enhancing or aggravated-felony provision is irreconcilable with this clear congressional understanding.[21]

Nor can Congress's decision to create a separate and distinct CCE offense be ignored for double jeopardy purposes on the ground that it was an empty or baseless choice. As previously noted, the legislative label that two statutory crimes are different is not alone sufficient to make them so for constitutional purposes. Here, however, Congress's approach to CCE was a rational and meaningful one that is well within its authority to prescribe criminal offenses. As the legislative record makes abundantly clear, the CCE provision in 21 U.S.C. 848 is designed to deal with the professional criminals and drug "kingpins," including members of organized crime, who stand to make enormous profits from illicit drug trafficking.[22] Indeed, while the Drug Act generally eased the penalties in pre-existing law for drug violations, CCE constituted a conspicuous exception whereby Congress provided severe sanctions that would deter, punish, and incapacitate the leaders of drug enterprises.[23] See *Jeffers* v. *United States*, 432 U.S. 137, 148-149 n.14, 156 & n.26 (1977) (plurality opinion); cf. *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981), quoting *Gore* v. *United States*, 357 U.S. 386, 390 (1958); *United States* v. *Moore*, 423 U.S. 122, 132, 139 (1975). In addition, by means of the forfeiture provision in Section 848, Congress sought to seize the profits of drug dealers and remove their influence over and continuing involvement in such criminal enterprises. The legislation was thus designed to "give our law-enforcement officials the tools they need to crack down hard on the organized criminals and pushers who profit from agony and death" (116 Cong. Rec. 33616 (1970) (remarks of Rep. Giaimo)) and "to attack the roots of illegal drug traffic" (*id.* at 33646 (remarks of Rep. Boggs)). See also *id.* at 33648 (remarks of Rep. Clausen).

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[20] Representative Poff urged that the statute "should pursue both [the CCE and DSDO] approaches: first, to give the prosecution the option of approaches and, second, to strengthen the statute against possible constitutional attack." 116 Cong. Rec. 33630 (1970). See page 29 note 21, *infra.*

[21] We recognize that concerns were raised about the constitutionality of the DSDO sentence enhancement provision and that this was an important reason for the adoption of the CCE provision. See, *e.g.,* H.R. Rep. 91-1444, *supra,* at 83-84 (additional views); 116 Cong. Rec. 33302, 33627, 33633 (1970) (remarks of Rep. Eckhardt); *id.* at 33630-33631 (remarks of Rep. Poff). Thus, Congress created the new and distinct offense of CCE that would be subject to the customary rules and procedures for criminal trials. To be sure, nothing suggests that Congress enacted CCE purposely in order to allow successive prosecutions. However, CCE having been established as a separate and independent crime, the legal consequence follows that the Double Jeopardy Clause does not bar such prosecutions, since they do not involve the same offense. The significant constitutional question is not whether the legislature specifically intended to authorize successive trials but rather whether the offenses it prescribed are different so that the Double Jeopardy Clause does not forbid the second proceeding.

[22] See H.R. Rep. 91-1444, *supra,* at 10; 116 Cong. Rec. 33616 (1970) (remarks of Rep. Giaimo); *id.* at 33627 (remarks of Rep. Eckhardt); *id.* at 33630 (remarks of Rep. Fascell); *id.* at 33631 (remarks of Rep. Weicker); *ibid.* (remarks of Rep. Taft); *id.* at 33648 (remarks of Rep. Clausen); *id.* at 33651 (remarks of Rep. Brotzman).

These congressional objectives reinforce the commonsense conclusion that engaging in a continuing criminal enterprise is not in any meaningful sense the same offense as any particular predicate act involved. Simply put, being a professional drug trafficker operating an ongoing drug business is not the same thing as the individual sale or importation of drugs. By virtue of his repeated criminality, his involvement with five or more other people, his role as an organizer, supervisor, or manager, and the substantial income or resources he derives from the enterprise that can be used to promote future drug dealings, the CCE defendant poses a threat to society that is separate and distinct from, and goes far beyond, the evils entailed in any specific drug transaction. The CCE statute correspondingly creates a new criminal offense that is separate from—and not merely an enhanced or aggravated form of—a substantive predicate; rather than simply increasing the degree of or penalty for the predicate, CCE is aimed at a distinct offender—the drug kingpin—and defines a distinct offense—continuing criminal enterprise. To be sure, one indication that a person is the sort of drug trafficker who warrants the severe treatment provided by CCE is that he has engaged in a continuing series of drug violations. But that fact is hardly tantamount to saying that CCE and the drug violations are the same offense. Here, the whole is greater than the sum of the parts, and it is the difference between the two—and not the individual parts themselves—that is the focus of CCE.[24]

Accordingly, because Congress exercised its legislative authority to establish CCE and the substantive predicate acts as separate offenses, and because that statutory scheme is based on substantial and rational grounds that reflect meaningful differences between the two provisions, the Double Jeopardy Clause did not bar petitioner's successive prosecutions for importation of marijuana and CCE.[25]

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[23] See, *e.g.*, H.R. Rep. 91-1444, *supra*, at 1, 4, 10; *id.* at 85 (additional views); 116 Cong. Rec. 33315 (1970) (remarks of Rep. MacGregor).

[24] Petitioner argues at length (Br. 9-15) that CCE is a substantive rather than a conspiracy offense and therefore should be presumed to be the same offense as the substantive predicates. In fact, Congress created CCE as a new and innovative offense to deal with the complex problem of professional drug traffickers. CCE possesses characteristics of both traditional conspiracy and traditional substantive offenses: through the requirement that the defendant participate in the enterprise in concert with five or more people, it takes account of the group nature of the crime that is usually reflected in a conspiracy offense; at the same time, through the requirements of the predicate offenses (at least where those offenses are substantive rather than conspiracy crimes) and the receipt of substantial income or resources, CCE takes account of the consumated evil that is usually reflected in a substantive offense. This Court and the courts of appeals have considered CCE to be a unique conspiracy-type offense. See, *e.g.*, *Jeffers* v. *United States*, *supra*; *United States* v. *Sinito*, 723 F.2d at 1261; *United States* v. *Phillips*, 664 F.2d at 1013. We believe that CCE is sufficiently like a conspiracy "to attribute to Congress 'a tacit purpose—in the absence of any inconsistent expression—to maintain [the] long-established distinction between [the] * * * different [offenses of conspiracy and the substantive objects].'" *Iannelli* v. *United States*, 420 U.S. 770, 779 (1975), quoting *Callanan* v. *United States*, 364 U.S. 587, 594 (1961). See *United States* v. *Mourad*, 729 F.2d 195, 203 (2d Cir. 1984), petition for cert. pending, No. 83-2067. There is no reason to assume that Congress did not intend to "retain each offense as an 'independent curb' available for use in the strategy against [drug trafficking]." *Iannelli*, 420 U.S. at 791, quoting *Gore*, 357 U.S. at 389.

### B. Alternatively, As In The Case Of Habitual Offender Statutes, The Double Jeopardy Clause Is Not Violated By The Use Of A Previously Prosecuted Offense To Increase The Severity Of The Principal Felony

Even if the Court concludes that CCE and a substantive predicate crime may be "the same offense" in some circumstances, the Double Jeopardy Clause would not bar the successive prosecutions at issue here. In our view, successive prosecutions for a substantive charge and for CCE would remain constitutionally permissible, provided that the previously prosecuted substantive offense is not the principal felony in the CCE count.

Previously prosecuted offenses are used in many areas of the criminal law, and it has never been thought that such uses violate double jeopardy. For example, "other crimes" evidence is admissible as substantive proof at trial where it is relevant to such issues as intent, knowledge, or identity. See Fed. R. Evid. 404(b). Similarly, prior convictions can be used to impeach the credibility of a witness. See Fed. R. Evid. 609.

In addition, the law commonly uses extrinsic criminal acts in the definition of a new offense or the specification of punishment. Thus, the use of the telephone to facilitate the commission of a drug felony is itself a federal crime. 21 U.S.C. 843(b). In addition, it is unlawful for a previously convicted felon to receive a firearm that has been transported in interstate commerce. See 18

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[25] For this reason, we believe that the decision in *United States* v. *Middleton*, 673 F.2d 31 (1st Cir. 1982), upon which petitioner relies (Br. 27-28) is incorrect. Of course, principles of collateral estoppel would, in appropriate circumstances, serve to protect a defendant like Middleton who is charged and acquitted of CCE and then prosecuted for one of the predicate offenses. Compare 673 F.2d at 34 n.4; page 12 note 5, *supra*.

U.S.C. 922(h) and 18 U.S.C. App. 1202(a). And recidivist or habitual offender statutes specifically contain enhancement provisions applicable to defendants who have previously committed enumerated crimes. See, *e.g.*, 8 U.S.C. 1325; 18 U.S.C. 2114; 21 U.S.C. 841(b)(1)(A).

The double jeopardy issue raised by petitioner (assuming, contrary to our first argument, that CCE and a substantive predicate can be "the same offense" in some circumstances) is comparable to that presented in cases involving recidivist or habitual offender statutes. Provided that the previously prosecuted substantive offense does not constitute the principal felony for CCE, successive prosecutions for that offense and CCE do not violate the Double Jeopardy Clause.[26]

In terms of double jeopardy principles, petitioner's interest in avoiding the CCE prosecution is the same as it would be if the statute prescribed an aggravated form of the principal felony where the other CCE elements are met—that is, where the defendant committed the principal felony as part of a continuing series of drug violations, he undertook the series of violations in concert with five or more people, he occupied a position as organizer, supervisor, or manager, and he obtained substantial income or resources from the violations. This hypothetical CCE statute would define the situations in which, because of the defendant's characteristics and the continuing and substantial nature of his drug operations, the principal felony should be enhanced.

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[26] For the reasons stated in Part I(A), *supra*, we believe that the CCE statute should be construed to be a new and separate offense rather than an aggravated or enhanced form of the underlying felony. If the Court disagrees with this construction, the applicable double jeopardy analysis is that which we now discuss in this part of the brief. Alternatively, to the extent the Court agrees with our interpretation of the statute but nevertheless concludes that CCE and a substantive predicate can be the same offense for double jeopardy purposes, the present analysis is also appropriate. In other words, this analysis of double jeopardy principles focuses not on the meaning of the CCE statute but on whether petitioner's protected constitutional interest is infringed in the circumstances of this case. If the use of the Washington evidence at the Florida trial is constitutionally comparable to other situations in which the Double Jeopardy Clause is not violated, that is the end of the inquiry, and a violation does not somehow arise simply because Congress did not conceptualize the CCE statute in terms of those analogies. To put the matter another way, Congress intended CCE to be a broad and effective weapon in the war on drug trafficking. It would be wholly unjustified to foreclose the CCE prosecution altogether in this case if the actual use of the Washington evidence would have been permissible here had Congress only formulated CCE in more circumscribed and limited terms (for example, explicitly as an aggravated form of the principal felony).

We see no constitutional difference between a defendant's double jeopardy interest under CCE where the previously prosecuted offenses are used to establish the statutory elements other than the principal felony, and the interest of a defendant under the hypothetical statute who objects to the use of offenses for which he was previously convicted to establish the enhancement factors. In both instances the defendant is not being prosecuted or sentenced again for an offense of which he was previously convicted. Rather, he is put in jeopardy for a new offense—the principal felony—that is enhanced because of the circumstances of the case, including the fact that the defendant has engaged in repeated criminal conduct.

Nothing in the Double Jeopardy Clause prohibits the use of previously prosecuted offenses to increase the degree of a new criminal violation or raise the applicable penalty. Indeed, for nearly a century this Court has consistently rejected double jeopardy challenges to recidivist or habitual offender statutes that rely on such

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[27] See *Moore* v. *Missouri*, 159 U.S. 673 (1895); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *Gryger* v. *Burke*, 334 U.S. 728 (1948); *Oyler* v. *Boles*, 368 U.S. 448, 451-452 (1962); *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967); *Rummel* v. *Estelle*, 445 U.S. 263, 268 (1980); *Baldasar* v. *Illinois*, 446 U.S. 222, 227 (1980) (Marshall, J., concurring); *id.* at 232 (Powell, J., dissenting); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); see also *Carlesi* v. *New York*, 233 U.S. 51 (1914).

prior convictions.[27] As the Court summarized in *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948):

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

See also *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912). In light of these authorities, recidivist statutes are "no longer open to serious challenge" under the Double Jeopardy Clause. *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962).[28]

We believe that this analysis is controlling here. Where a defendant has not previously been prosecuted on the principal felony, the use of his prior offenses at the CCE trial no more violates his double jeopardy rights than does the use of prior offenses under a recidivist statute. In terms of the policies of the Double Jeopardy Clause, the defendants in both cases are being tried once and only once for each of their crimes; the use of the prior violations to satisfy the statutory enhancement provisions does not transform those violations and the later charge into one offense that must be prosecuted in a single proceeding.

A similar analysis was followed in *United States* v. *Lurz*, *supra*. There, the defendant was initially charged with conspiracy in the Middle District of Florida and later was indicted for CCE in the District of Maryland; he was convicted in Florida, and evidence of that offense was introduced in the Maryland CCE trial. Because the Florida violation was used in Maryland to prove the elements of CCE other than the principal felony, the court of appeals held that the Double Jeopardy Clause did not bar the Maryland prosecution. Finding that CCE "is a variant of recidivist statutes" (666 F.2d at 77), the court concluded (*ibid.*):

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[28] It is also well-settled that judges may, consistent with the Double Jeopardy Clause, consider previously prosecuted offenses in imposing sentence on a defendant for a new offense. See *Williams* v. *Oklahoma*, 358 U.S. 576, 584-586 (1959); cf. *Alabama* v. *Evans*, 461 U.S. 230, 232-233 (1983) (per curiam).

> To hold that evidence used to obtain a prior conviction different from the [principal] predicate federal felony for § 848 purposes cannot be used to prove the defendant's participation in a series of offenses meriting aggravated punishment, where Congress intended otherwise, would be at war with the rationale which has validated recidivist statutes. * * * The fact that prior convictions comprise one element of an offense does not offend the double jeopardy clause, as long as the prior convictions are used for the limited purpose, which was legislatively intended, of showing the need for more severe punishment—i.e., to prove * * * [the other elements of CCE], and not * * * [the principal felony].

We recognize, of course, that recidivist statutes typically involve a sentence-enhancement provision rather than an aggravated degree of substantive offense and that the prosecutor's proof usually consists of the prior judgments of conviction rather than primary factual evidence of those crimes; CCE, on the other hand, involves a substantive offense in which the aggravating conditions (including the continuing series of violations) are part of the government's case-in-chief and generally entail testimonial and physical evidence other than the bare judgments of conviction.[29] These differences, while important in conferring substantial rights on defendants with respect to such matters as burden of proof, confrontation, and jury trial, do not undermine the foregoing double jeopardy analysis. The issues of whether a provision is cast in terms of an increased sentence or an aggravated crime (carrying with it a greater sentence), and what proof is regarded as sufficient to satisfy the recidivist provision, hardly implicate any substantial interest of the defendant that is protected by the Double Jeopardy Clause. The dispositive point is that where the defendant has not previously been tried on the principal felony, the use of prior convictions in the CCE case no more infringes double jeopardy than does the use of prior convictions in a recidivist case; in neither instance does the prosecution put him twice in jeopardy for the same offense.[30]

Applying this principle here, the successive prosecutions of petitioner for importation of marijuana and CCE did not violate the Double Jeopardy Clause. While the CCE indictment and jury instructions did not specify which of petitioner's numerous drug offenses could serve as the principal felony, the jury in the Florida proceeding in fact returned verdicts of guilty on two conspiracy counts and one telephone facilitation count in addition to the CCE count. Because these convictions would suffice to satisfy the principal felony requirement,[31] the existence of the requisite felony does not depend upon the proof of the Washington importation scheme. Accordingly, the Florida CCE prosecution did not place petitioner in double jeopardy for the Washington offense.

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[29] In CCE cases, it is clear that the prior offenses are relevant and admissible, and the only question is the form of proof to be used. Compare *Marshall* v. *Lonberger*, 459 U.S. at 438 n.6; *Spencer* v. *Texas*, *supra*. In this case, the Washington judgment of conviction was not introduced in evidence at the Florida CCE trial. We see no reason, though, why previous judgments of conviction would not be admissible and even sufficient to establish the requisite series of violations under the CCE statute. Nevertheless, even if the judgments of conviction are introduced, additional proof relating to those offenses normally would be necessary to meet the further requirements of CCE—that the principal felony was part of a continuing series of violations, that the defendant acted in concert with five or more people and was an organizer or supervisor, and that he derived substantial income or resources.

[30] We also note that in fact some recidivist statutes have involved aggravated degrees of the basic offense rather than only an enhanced sentence (see *Marshall* v. *Lonberger*, 459 U.S. at 425-426 & nn. 1, 2) and have required that the issue of prior convictions be decided on the basis of the trial record by the jury in its capacity either as the determiner of guilt (*ibid.*) or as the sentencer (*Spencer* v. *Texas*, 385 U.S. at 560-569).

[31] The use of conspiracy offenses as predicates for a CCE charge is not challenged by petitioner and has been upheld by the courts of appeals. See *United States* v. *Young*, No. 83-1364 (2d Cir. Sept. 17, 1984), slip op. 6250-6257; *United States* v. *Brantley*, 733 F.2d 1429, 1436 n.14 (11th Cir. 1984); *United States* v. *Middleton*, 673 F.2d at 33; but cf. *United States* v. *Jefferson*, 714 F.2d at 701 n.25, 702 n.27 (multiple punishment for CCE and

### C. In Any Event, Because The Substantive And CCE Charges Against Petitioner Could Not Reasonably Have Been Brought In One Proceeding, The Double Jeopardy Clause Did Not Bar Successive Prosecutions

Even if the Court concludes, contrary to the above arguments, that petitioner was subjected to successive prosecutions for "the same offense," we submit that the Double Jeopardy Clause does not require that his CCE conviction be set aside. Rather, because the various substantive and CCE charges against petitioner could not reasonably have been brought in one proceeding, the Florida prosecution did not violate double jeopardy.

#### 1. *Because Of Venue Requirements, All Of The Charges Against Petitioner Could Not Be Joined In One Proceeding*

Under the Constitution and the Federal Rules of Criminal Procedure,[32] a prosecution is to be brought in a district in which the offense was committed. Here, the importation of marijuana at Neah Bay, to which petitioner pleaded guilty, occurred in the Western District of Washington, and venue would not have been proper in Florida. Conversely, the substantive offenses with which petitioner was charged in the Florida indictment occurred in the Northern District of Florida, and venue did not lie in Washington. And the fact that the Washington and Florida substantive offenses occurred in the

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predicate conspiracy). In any event, since petitioner's double jeopardy contention must be rejected in light of the telephone facilitation conviction, resolution of the question presented in this case does not require the Court to decide whether a conspiracy offense can constitute a CCE predicate.

[32] See U.S. Const. Art. III, § 2, and Amend. VI; Fed. R. Crim. P. 18; see also 18 U.S.C. 3231 *et seq.*

course of a continuing criminal enterprise does not mean that those offenses could be joined with the CCE count in a district where venue would otherwise be impermissible. See *United States* v. *Chagra*, 653 F.2d 26, 32 (1st Cir. 1981), rev'g on other grounds 494 F. Supp. 908, 911 (D. Mass. 1980), cert. denied, 455 U.S. 907 (1982); see also *United States* v. *Davis*, 666 F.2d 195, 200-201 (5th Cir. 1982) (conspiracy and substantive offenses).

Accordingly, the substantive predicate offenses and the CCE offense could not be prosecuted in a single proceeding. If no court has authority to try all of the charges against a defendant, successive prosecutions, even for "the same offense," do not violate the Double Jeopardy Clause. See *Diaz* v. *United States*, 223 U.S. 442, 449 (1912); *Ashe* v. *Swenson*, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring); *United States* v. *Chagra*, 494 F. Supp. at 910-911. Nor is there any constitutional difference, in terms of the double jeopardy protection against successive prosecutions, between bringing the CCE count in the Washington proceeding and bringing it in the Florida proceeding; the Florida offenses and CCE were as much "the same offense" as the Washington offense and CCE.[33]

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[33] Although the relevant facts are not in the record, and therefore a remand for further proceedings would be appropriate if the Court considers these issues to be material, we are advised by the trial prosecutors of the following with respect to their decision to bring the CCE charge in Florida: First, the defendants charged in the Florida indictment (including petitioner) lived in or had substantial contacts with Florida (and in most instances the Northern District of Florida); thus, that was a convenient and logical forum in which to proceed. Second, the government's key witness lived in the Northern District of Florida, and the investigation had been handled by case agents in that district, so it was also convenient for that witness and for the production of much of the government's exhibits (although, because of the nationwide scope of petitioner's enterprise, no one district would be convenient for all of the government's proof). Third, it was doubtful that all of the defendants in the Florida conspiracy counts could have been indicted in Washington, and hence bringing the CCE charge against petitioner in Washington would have required a substantial dupli-

Furthermore, petitioner's argument would result in an unjustifiable windfall for defendants where—as here and in many other cases involving nationwide drug trafficking enterprises—the CCE and substantive predicate charges cannot be tried together. His position is that once the government has elected to bring the CCE count in one of the proceedings, it is required either to omit from its CCE proof all evidence relating to the substantive offenses in the other proceedings or, if it makes use of such evidence, to forgo prosecution on the other offenses entirely. However, the former alternative would disable the government from presenting its complete case against the defendant on the CCE charge and would pose the risk that he might be undeservedly acquitted by the jury. On the other hand, the latter alternative would enable the defendant to avoid prosecution altogether for those substantive offenses that cannot be included in a single proceeding.[34] Nothing in the Double Jeopardy Clause imposes such unreasonable restrictions on the criminal justice system or entitles drug traffickers to escape the full measure of responsibility for their crimes. Where the CCE and the substantive predicate charges cannot all be joined in one trial, successive prosecutions entail "none of the governmental overreaching that double jeopardy is supposed to prevent." *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 9. Rather, by calling upon defendants like petitioner to answer for their widespread drug activities, the government merely seeks "one full and fair opportunity to convict those who have violated its laws" (*ibid.*). See also *United States* v. *Scott*, 437 U.S. 82, 101 (1978); *Burks* v. *United States*, 437 U.S. 1, 15 (1978); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964).[35]

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cation of proof in the two proceedings; in addition, there was concern that the Florida jury might be reluctant to convict the other defendants if petitioner, as the leader of the operation, were absent from that trial. Fourth, because of the cooperation of local authorities in the investigation of petitioner and the existence of a serious problem of drug importation by fishermen in northern Florida, it was believed that effective law enforcement and general deterrence would be promoted by prosecuting petitioner for CCE in the Northern District of Florida. In light of these factors that have been represented to us, it appears that the decision to pursue the CCE charge as part of the Florida proceeding was fully reasonable and represented a sound exercise of prosecutorial discretion.

[34] Whether a defendant can be cumulatively punished for CCE and the substantive predicate offenses is a separate issue that is discussed in Part II, *infra*. If, as we contend, cumulative punishments are permissible, petitioner's submission would have the consequence of immunizing defendants from the sanctions provided by law for their substantive crimes. But even if cumulative penalties are not authorized, that would not support petitioner's argument against successive prosecutions where all the charges cannot be brought together. For example, where a defendant is first prosecuted for CCE and acquitted, a rule against cumulative punishments would not bar a subsequent prosecution for one of the substantive predicate offenses (although collateral estoppel might, depending upon the ground of the acquittal); since the defendant was not punished in the first proceeding, the second trial could not result in multiple punishments. Similarly, if the defendant is first tried and convicted of a substantive predicate offense, a rule against cumulative punishments would not preclude a trial on the CCE charge; if convicted of CCE, the defendant would, as in *Jeffers*, be subject to the penalties provided for that offense, subject to credit for the punishment in the first proceeding. Only if a defendant is first prosecuted and convicted of CCE would a rule against cumulative punishments foreclose a second prosecution; in that circumstance, such a rule would mean that no penalty could be imposed in the second proceeding, and hence the prosecution would be pointless. It should be emphasized that in all of these instances, and contrary to petitioner's position, the defendant would be in no better position by virtue of the impossibility of joinder than he would have been in if all of the charges had been brought in one proceeding.

[35] In his dissent from the denial of certiorari in *Borchardt* v. *United States*, No. 83-1643 (Oct. 29, 1984), Justice Brennan argued that the Double Jeopardy Clause requires that, in a case in which two crimes constitute "the same offense" but are brought in different districts for reasons of venue, a defendant must be simultaneously charged in the two proceedings and given an opportunity to waive the venue requirements so that the charges can be resolved in a single trial. We are aware of no authority for this novel interpretation of double jeopardy. On the contrary, the defendant has no absolute right—constitutional or otherwise—to waive venue. See *Singer* v. *United States*, 380 U.S. 24, 35 (1965);

### 2. *Successive Prosecutions Are Not Barred Where, In Light Of The Facts Of The Offenses And The Government's Investigation And Evidence, It Would Not Be Reasonable To Require The Charges To Be Brought In One Proceeding*

The Court has held that successive prosecutions for "the same offense" do not violate the Double Jeopardy Clause where all of the facts necessary to one of the crimes had not occurred at the time of the first trial. See *Diaz* v. *United States*, 223 U.S. at 449 (successive prosecutions for assault and homicide permissible where victim did not die until after assault trial); see also *Illinois* v. *Vitale*, 447 U.S. at 420 n.8; *Brown* v. *Ohio*, 432 U.S. at 169 n.7; *Jeffers* v. *United States*, 432 U.S. at 151 (plurality opinion); *Blackledge* v. *Perry*, 417 U.S. 21, 29 n.7 (1974); *Ashe* v. *Swenson*, 397 U.S. at 453 n.7 (Brennan, J., concurring). Accordingly, under *Diaz*, a CCE prosecution following a substantive drug prosecution would not be barred if, prior to the first proceeding, the defendant had not committed a CCE offense because, *e.g.*, he had not engaged in a series of drug violations or obtained substantial income from the operation.

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Fed. R. Crim. P. 21(b). Cf. *Illinois* v. *Vitale*, *supra* (Double Jeopardy Clause does not require prosecutor to disclose evidence in advance of trial in order to determine whether the proceeding involves the same offense as had previously been prosecuted). Moreover, the suggested procedure would raise substantial questions in light of the Executive Branch's constitutional authority over the investigation and prosecution of crimes. And, as discussed elsewhere (see pages 39-40 note 33, *supra*, and page 44, *infra*), it was not unreasonable for the government to bring the Washington and Florida charges against petitioner in different jurisdictions and at somewhat different times. The defendant should not be given the right to choose the manner of proceeding that would be most burdensome for the courts, the prosecution, and the witnesses; on the contrary, in our "adversary system * * * the Government, as a litigant, has a legitimate interest in seeing that cases * * * are tried" in the manner provided by the Constitution, including trial in a venue that promotes the sound and efficient administration of justice (*Singer* v. *United States*, 380 U.S. at 36).

The Court has also recognized that a similar exception to the rule against successive prosecutions

> may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge * * * have not been discovered despite the exercise of due diligence.

*Brown* v. *Ohio*, 432 U.S. at 169 n.7; see also *Illinois* v. *Vitale*, 447 U.S. at 420 n.8; *Jeffers*, 432 U.S. at 152 (plurality opinion); *Ashe* v. *Swenson*, 397 U.S. at 453 n.7 (Brennan, J., concurring). We believe that this "due diligence" exception represents a sound principle of double jeopardy that is supported by essentially the same considerations underlying *Diaz* itself and fairly balances the public interest in criminal law enforcement and a defendant's interest in avoiding successive prosecutions.

In addition, a like principle should apply where the government, although aware of the basic facts, reasonably believes that the evidence thus far developed does not warrant prosecution or would not support a conviction. See M. Friedland, *Double Jeopardy* 192 (1969). It would pervert the rights afforded by the Double Jeopardy Clause to require the government to pursue a criminal prosecution precipitously or else risk not being able to prosecute at all. Any such requirement would interfere with sound investigatory and prosecutorial practices, would lead to an increased possibility of multiple trials against defendants involved in the same criminal transaction but uncovered at different times, and would impose a burden and stigma on prospective defendants who would be shown to be innocent or would not otherwise be indicted in light of further information. A requirement that the government rush to bring criminal charges has been rejected as undesirable and unworkable in other constitutional areas (see *United States* v. *Lovasco*, 431 U.S. 783, 790-796 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 309-310 (1966)), and it should be equally rejected under the Double Jeopardy Clause.

In this case, the facts necessary to apply the above principles have not been developed in the record. It does appear that all of the elements required for a CCE charge had occurred at the time of petitioner's prosecution in Washington; therefore, while the *Diaz* principle is an important one in general, it does not resolve the instant case. However, whether the government was fully aware of the essential facts or in the exercise of due diligence should have been aware of them, and whether those facts should reasonably have led the government to conclude at the time that a CCE prosecution was warranted, is unclear. The prosecutors in the Washington and Florida proceedings have advised us that when the Washington indictment was returned in March 1981 and when petitioner pleaded guilty to the importation count in May 1981, the CCE investigation had not yet been completed and the case had not yet been presented to the grand jury. Only thereafter, in July 1981, was petitioner indicted on the CCE charge in Florida.[36] Therefore, at the time of the Washington case, the government was not ready to proceed on a CCE count, and it would have delayed resolution of the Washington charges to defer them pending completion of the CCE probe. On the other hand, we acknowledge that the government had conducted a substantial investigation into petitioner's drug trafficking activities by the time the Washington charges were brought. To the extent the Court deems these issues material to the ultimate disposition of the case, the appropriate course would be to remand for a

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[36] As petitioner notes (Br. 2-3 & n.2, 22 & n.23), the Assistant United States Attorney in the Washington prosecution stated at a bail hearing that the Department of Justice had originally given the required authorization for a CCE charge to be brought in Washington (see *United States Attorney's Manual* § 9-100.280, at 39 (Mar. 9, 1984)) but had subsequently rescinded that approval. We are advised that in fact the Department had not authorized a CCE charge in Washington and that the investigation had not then been concluded; the Assistant United States Attorney now acknowledges that such authority was never granted and that his statement to the contrary was in error.

factual hearing in the district court in light of the legal standards that the Court announces.

We observe in closing that the inquiries just outlined are not free from difficulties. To determine what the government knew or should have known, and whether that knowledge would have warranted the initiation of criminal charges, is a hazardous undertaking that breaches the confidentiality of the Executive's investigatory and prosecutorial functions and diverts the criminal proceeding from the central issue of the defendant's guilt. It is therefore with considerable hesitation and doubts about its general utility that we advance this argument. Nevertheless, if the Court concludes that CCE and a substantive predicate can be "the same offense" for double jeopardy purposes, it is important that in appropriate cases the government be afforded the opportunity to show that successive prosecutions do not violate the Double Jeopardy Clause because it would not be reasonable to require the charges to be brought in one proceeding.

## II. CUMULATIVE PENALTIES MAY BE IMPOSED FOR CCE AND A SUBSTANTIVE PREDICATE OFFENSE

Petitioner's sentence on the CCE count in Florida is consecutive to his sentence on the substantive importation count in Washington (J.A. 95). He contends (Br. 30-32) that this constitutes multiple punishments for the same offense and thus violates the Double Jeopardy Clause.[37]

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[37] The judgment and sentence order in Florida also provides that the CCE sentence is concurrent with the sentences on the telephone facilitation and conspiracy counts in that case (J.A. 94-95). We are advised by the clerk of the district court that this means that the terms of imprisonment are to be served together but that the fine on the CCE count is in addition to the fines on the other counts. Thus, as we stated in our brief in opposition (at 2, 14-15 nn.9 & 10, 17 n.17), petitioner's total fine in the Florida case is $145,000. In his brief on the merits petitioner neither takes issue with this conclusion nor challenges

Petitioner's argument appears to be that the cumulative sentence in Florida is impermissible because the entire second prosecution was barred by double jeopardy. That is the issue discussed in Part I, *supra*, and, if petitioner is correct that the Florida proceeding was invalid, the Florida sentence would of course have to be set aside. But, as in *Jeffers*, 432 U.S. at 154-155 & n.23 (plurality opinion), there is a distinct issue of the propriety of cumulative penalties even if two prosecutions were allowable. Because it involves the constitutional protection against multiple punishments rather than successive prosecutions, this issue of cumulative sentences is the same whether the charges were tried separately or together. *Ibid.*[38] If petitioner prevails on the multiple punishment question, he would be entitled to credit for his Washington sentence against his Florida CCE sentence; there would be no basis, however, as petitioner seems to assume, to vacate his CCE sentence on grounds of multiple punishment.[39]

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the propriety of the cumulative penalties on the CCE and predicate counts in Florida.

In addition, as previously explained (see page 10 note 3 and pages 37-38 & note 31, *supra*), the Washington offense is properly viewed not to be a predicate offense necessary to conviction on the CCE count, in light of the three telephone facilitation and conspiracy convictions in this case. On that basis alone, petitioner's cumulative sentences for CCE and importation of marijuana should be affirmed.

[38] There is no doubt that a defendant can be tried in a single proceeding on both CCE and the predicate offenses even if they are "the same offense." See *Ohio* v. *Johnson*, slip op. 7; *Jeffers*, 432 U.S. at 153 (plurality opinion); *Iannelli*, 420 U.S. at 786 n.18; *United States* v. *Leifried*, 732 F.2d 388, 389 (4th Cir. 1984); *United States* v. *Jefferson*, 714 F.2d at 703. The only issue is whether a defendant convicted of all such charges may be cumulatively sentenced for CCE and the predicate offenses.

[39] For the reasons noted in our brief in opposition (at 16 & n.14), it would be appropriate for the Court, in the event the cumulative sentences are found to be invalid, to remand the case to the court of appeals to consider whether petitioner may be resentenced on the CCE count. See also *Busic* v. *United States*, 446 U.S. 398, 412 n.19 (1980).

The Court has made clear that the propriety of cumulative punishments under the Double Jeopardy Clause is strictly a matter of legislative intent. See *Ohio* v. *Johnson*, slip op. 6 & n.8; *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz*, 450 U.S. at 343-344; *Whalen*, 445 U.S. at 691-693. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366. Thus,

> the question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

*Id.* at 368, quoting *Albernaz*, 450 U.S. at 344. Under this principle, the fact that two offenses are the same "does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments * * *. Where * * * a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct * * *, the prosecutor may seek and the trial court * * * may impose cumulative punishment under such statutes in a single trial." *Missouri* v. *Hunter*, 459 U.S. at 368, 369. Accordingly, "[e]ven if the crimes are the same * * *, if it is evident that a * * * legislature intended to authorize cumulative punishments, a court's inquiry is at an end." *Ohio* v. *Johnson*, slip op. 6 n.8.

As the above decisions also show, the usual standard for determining if the legislature intended to authorize cumulative sentences under two statutes is "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.[40] Where the *Block-*

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[40] In addressing the sentencing issue, the *Blockburger* test looks to the statutory elements of the offense and not to the allegations of the indictment or the government's proof at trial in a given case. See *Albernaz*, 450 U.S. at 337-338; *Iannelli*, 420 U.S. at 785 n.17.

*burger* test is satisfied, legislative intent in favor of cumulative sentences is to be presumed in the absence of a clear indication to the contrary. See *Ohio* v. *Johnson*, slip op. 6 n.8; *Missouri* v. *Hunter*, 459 U.S. at 366-368; *Albernaz*, 450 U.S. at 340; *Whalen*, 445 U.S. at 691-693. In the end, the controlling issue is the intention of the legislature to authorize cumulative sentences.

As we have already discussed in connection with the question of successive prosecutions (see pages 16-19, *supra*), the application of the *Blockburger* test to compound-predicate offenses (including CCE) is problematic. Fortunately, in resolving the issue of cumulative sentences for CCE and substantive predicate offenses, it is unnecessary to employ *Blockburger*. Rather, Congress's intent to authorize such cumulative sentence is sufficiently evident without resort to the *Blockburger* presumption.[41]

The basic grounds for our submission have been presented in Part I, *supra*, and need be only briefly recounted here.[42] From the text, history, and purpose of

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[41] As noted in our brief in opposition (at 16 n.12), the courts of appeals are in conflict on the issue of cumulative sentences for CCE and substantive predicate offenses. See also *United States* v. *Brantley*, 733 F.2d 1429, 1436-1437 (11th Cir. 1984); *United States* v. *Leifried*, 732 F.2d at 389.

[42] We also note that under the analogous RICO statute the courts of appeals are in agreement that cumulative sentences are authorized for the predicate acts of racketeering and the compound offense of conducting the affairs of an enterprise through a pattern of racketeering activity. See *United States* v. *Truglio*, 731 F.2d 1123, 1129-1130 (4th Cir. 1984); *United States* v. *Licavoli*, 725 F.2d at 1050; *United States* v. *Sutton*, 700 F.2d 1078, 1081 (6th Cir. 1983); *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir. 1983), cert. denied, No. 82-2043 (Oct. 3, 1983); *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, 460 U.S. 1069 (1983); *United States* v. *Boffa*, 688 F.2d at 938; *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Dean*, 647 F.2d 779, 785 n.14 (8th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Hawkins*, 658 F.2d at 285-288; *United States* v. *Peacock*, 654 F.2d 339, 348-349 (5th Cir. 1981); *United States* v. *Grande*, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 449 U.S. 830 and 919 (1980); *United States* v. *Boylan*, 620 F.2d 359, 361 (2d Cir.), cert.

the statute, it is clear that Congress envisioned CCE to be a new and separate offense and not merely an enhanced form of the existing drug provisions. Congress directed the CCE statute at professional drug traffickers and members of organized crime, and its expected that CCE defendants would be dealt with severely by the criminal justice system. Where two offenses are different—whether under the *Blockburger* test or, as here, on the basis of direct evidence of the legislature's understanding—cumulative sentences for those offenses are ordinarily authorized; the propriety of such sentences under CCE is strongly reinforced by the congressional attitude of severity toward large-scale drug dealers.[43]

Of course, in creating CCE as a separate offense, Congress did not state in so many words that it intended to authorize cumulative sentences. But the permissibility of cumulative sentences is a well-settled legal consequence of the fact that two offenses are not the same. The Court held in *Albernaz*, 450 U.S. at 340-341, that legislative silence on the specific issue of cumulative sentences does not establish an ambiguity or undermine the conclusion that such sentences are authorized for different offenses. As the Court explained (*id.* at 341-342; citations and footnote omitted):

> [The defendants] read much into nothing. Congress cannot be expected to specifically address each issue

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denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d at 306; *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

[43] If the Court rejects our primary construction that CCE is an entirely independent offense and concludes instead that it is an enhanced form of the principal felony (see pages 22-24 and page 33 note 26, *supra*), it would be necessary to vacate petitioner's sentence on one of the predicate offenses. Because the indictment and jury instructions do not specify which predicate offense is the principal felony, and because petitioner was convicted of several predicates that would satisfy the principal felony element, it would be appropriate for the Court to remand the case to the court of appeals to consider which sentence should be set aside. This would not, however, require that the sentence for the Washington importation offense be the one that is voided.

> of statutory construction which may arise. But, as we have previously noted, Congress is "predominantly a lawyer's body," and it is appropriate for us "to assume that our elected representatives . . . know the law." * * * As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was * * * [cognizant of the effect of offenses being separate] and legislated with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished * * *."

See also *Whalen*, 445 U.S. at 692-693.

Furthermore, petitioner's argument would lead to irrational conclusions that Congress could not have intended. The statute should be construed to avoid these "absurd results." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). First, if a CCE sentence is held to preclude sentences for all of the substantive predicate offenses on which evidence was introduced to prove the CCE charge, it would be to the defendant's advantage in some respects to be sentenced under CCE rather than under the substantive predicate provisions. For example, a defendant who commits ten illegal acts of distributing narcotics is subject to a fine of $25,000 for each offense (21 U.S.C. 841(b)(1)(A)), or a total fine of $250,000; on the other hand, the maximum fine for CCE is $100,000 (21 U.S.C. 848(a)(1)). In addition, the defendant would be subject to a mandatory term of special parole for the distribution offenses (21 U.S.C. 841 (b)(1)(A) and (c)); in contrast, no special-parole term is provided for CCE. See 21 U.S.C. 848(c); *Bifulco* v. *United States*, 447 U.S. 381, 399 (1980); *United States* v. *Chagra*, 669 F.2d 241, 262-266 (5th Cir.), cert. denied, 459 U.S. 846 (1982).

Even if the CCE sentence forecloses cumulative sentences only for those substantive predicate offenses necessary to establish the continuing series of three drug violations (see page 22 note 13, *supra*), such a rule would still be illogical. As an illustration, a defendant who has previously been convicted of a drug felony is subject to an enhanced penalty for narcotics distribution, including a maximum fine of $50,000; hence, a second or subsequent offender who is convicted on three predicate distribution counts would face a total fine of $150,000 for those offenses—an amount that exceeds the ceiling for a CCE fine. And again, the CCE sentence, in contrast to the sentences for the substantive predicate offenses, could not contain a special-parole term.

Nor could such inconsistencies be avoided by excluding cumulative sentences only for CCE and the principal predicate felony. The Drug Act, as amended in 1980, provides that a substantive offense involving more than 1000 pounds of marijuana is subject to a penalty, inter alia, of a fine of $125,000, or $250,000 if the defendant has previously been convicted of a drug felony. See 21 U.S.C. 841(b)(6); S. Rep. 96-916, 96th Cong., 2d Sess. 14 (1980); 126 Cong. Rec. 11791-11792 (1980). Where that marijuana offense is the principal felony for CCE, a defendant would be benefited, with respect to the lower maximum fine, by being sentenced under CCE instead of the marijuana provision.[44]

To be sure, the CCE statute itself provides substantial punishment for a violation of its terms, and we do not mean to overemphasize the practical importance of allowing cumulative sentences. But the severity of the CCE penalties is no answer to the above incongruities, and we can conceive of no reason why Congress would have intended such irrational and inexplicable results.[45]

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[44] We note that the ~~incongruities~~ Problems that result from petitioner's argument would be exacerbated under the increased penalty provisions in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 502 (Oct. 12, 1984), and in Pub. L. No. 98-596 (Oct. 30, 1984).

[45] Moreover, because of the no-parole provision in CCE, it can be advantageous for a defendant to have his total sentence apportioned over the CCE and predicate substantive counts rather than imposed entirely on the CCE count, since he would be eligible for an earlier release from incarceration. See *United States* v. *Jefferson*, 714 F.2d at 692-693, 707 n.34. Thus, the possibility of being sentenced on the predicate counts can be in the defendant's interest.

Of course, because CCE provides a term of imprisonment up to life, the total incarceration to which a defendant is subject will not be affected by the cumulative sentencing issue. However, a CCE defendant need not be sentenced to life imprisonment, a possibility that Congress itself recognized when it included a recidivist provision for second and subsequent CCE offenders. See 21 U.S.C. 848(a)(1). In that situation, the salutary purposes of special parole—to ensure adequate supervisory followup after release and to provide sentencing judges with another means of protecting society from drug violators (see *Bifulco* v. *United States*, 447 U.S. at 392)—are fully applicable. It is one thing for the CCE statute, within its four corners, not to authorize a special-parole term for a defendant convicted solely of a CCE offense; it is quite another matter to conclude that a defendant convicted of CCE and predicate substantive drug offenses should be immune from the special-parole term that is applicable to all other substantive drug offenders and that would be applicable to him if only he had not also been prosecuted and convicted for CCE.

The provision for a fine in the CCE statute also does not require the rejection of cumulative sentences for CCE and the substantive predicate offenses. We do not believe that "there would have been no point in specifying maximum fines for the [CCE] violation if cumulative punishment was to be permitted." *Jeffers*, 432 U.S. at 156 (plurality opinion). To our knowledge, a maximum fine is specified in every federal criminal statute that provides for a monetary penalty, and Congress's adherence to that practice in CCE reveals little if anything about legislative intent. In addition, Congress could well have concluded that a $100,000 fine was appropriate for the distinct element of criminality—organizing or managing a continuing and substantial drug trafficking enterprise—that was the focus of the new and separate CCE offense; this surely does not suggest, however, that by prescribing a new punishment adapted to that aspect of the drug problem, Congress intended professional drug dealers to

be free from the sanctions otherwise provided in the law for their substantive drug offenses.[46]

Likewise, the existence of a special forfeiture section in CCE (21 U.S.C. 848(a)(2)) does not eliminate the justification for cumulative sentences. While forfeiture is potentially an effective remedy and may reduce the need for cumulative fines in some cases, it is limited by the fact that the government must be able to trace, locate, and seize the drug profits; where, as often may be the case, that is not possible, the imposition of cumulative fines remains of considerable practical importance. Indeed, the fact that CCE itself contains both fine and forfeiture provisions indicates that the possibility of forfeiture does not supersede or replace the distinct penalty of a fine. There is simply no basis to infer that Congress meant to withdraw the authority to impose fines for substantive predicate offenses when it enacted the additional provision for CCE forfeiture.

Finally, we note that the analysis proposed here is consistent with the plurality opinion in *Jeffers*, 432 U.S. at 154-158, that cumulative punishments for CCE and conspiracy are improper. In contrast to *Jeffers*, the present case concerns the validity of cumulative sentences for CCE and substantive offenses, not conspiracies. Moreover, the conspiracy at issue in *Jeffers* was not one of the predicate offenses for the CCE conviction. See 432 U.S. at 141, 142-143 (plurality opinion); *id.* at 158 (White, J., concurring in the judgment in part and dissenting in part). Rather, the relation between the CCE and the conspiracy with which Jeffers was charged was a structural one inherent (given the plurality's view, arguendo, of the "in concert" requirement for CCE) in the statute;

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[46] After all, the series of violations underlying a CCE conviction could be three or three hundred, and the substantial income derived could be in the tens of thousands or the tens of millions. Surely, quite different fines would be in order depending on the number and magnitude of offenses committed by the enterprise—a factor that can be taken into account by retaining the flexibility to levy fines on the predicate offenses as well as on CCE.

regardless of which offenses serve as the predicates for CCE, a continuing criminal enterprise would always and necessarily entail a conspiracy. In other words, under the plurality's view of the statute, conspiracy is a true lesser-included offense of CCE that would invariably be proven whenever the CCE offense is established. In light of this intrinsic interrelation, the plurality found that the history and policies of the statute were "inconclusive" and "conflicting" on the question of cumulative punishments for CCE and an integrally-subsumed conspiracy (432 U.S. at 156 & n.26). Whatever the correctness of that conclusion in the *Jeffers* context, it does not extend to the quite different issue presented here. With respect to that issue, Congress intended CCE and the substantive predicates to be separate offenses, and nothing in the language, background, or purpose of CCE indicates that they should not be subject to cumulative sentences.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MARK I. LEVY
*Assistant to the Solicitor General*

JOEL M. GERSHOWITZ
*Attorney*

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10119

# REPLY
# BRIEF

Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

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No. 83-1842

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In The

# Supreme Court of the United States

October Term, 1984

JONATHAN GARRETT,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## REPLY BRIEF FOR PETITIONER JONATHAN GARRETT

PHILIP A. DEMASSA
*Counsel of Record*
RICHARD M. BARNETT
on the Brief,
2150 First Avenue
San Diego, CA 92101
(619) 236-0897

*Counsel for Petitioner*

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## ARGUMENT

### I

### UNDER ANY ANALYSIS, PETITIONER'S PROSECUTION ON A PRIOR SUBSTANTIVE DRUG CHARGE BARRED ADMISSION OF THAT EVIDENCE AND SUBSEQUENT PROSECUTION ON THE CONTINUING CRIMINAL ENTERPRISE CHARGE ON DOUBLE JEOPARDY GROUNDS BECAUSE THEY ARE THE SAME OFFENSE

#### A. The Double Jeopardy Clause Bars Successive Prosecutions Where Congress Has Proscribed A Continuous Course Of Conduct And The Government Improperly Attempts To Segment The Prosecution And Punishment Of That Continuous Course Of Conduct.

For approximately a century, this Court has held that a continuing offense can be committed but once for purposes of prosecution and punishment. Where "a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*, 131 U.S. 176, 188 (1889).[1]

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[1] Nielsen was charged on the same day with cohabitation with more than one woman from October 15, 1885 to May 13, 1888, a misdemeanor, and separately charged with felony adultery with one not his wife on May 14, 1888. Nielsen *alleged* that *the same proof was necessary* from the same witnesses covering the entire time of both indictments, to prove both indictments, to which the prosecution agreed. 131 U.S. at 186. Looking at both the indictment and the agreed upon *facts* necessary to prove the felony, the Court concluded that since the offense was continuous in character including the day the felony adultery was committed (May 14, 1888), and both charges included the cohabitation and adultery, the offenses were the same. The Government cites *Nielsen* to mean that the Court "is not limited to the literal language of the (statutory elements of an

(Continued on following page)

The statutory analyis test does not apply where the offense or transaction is continuous in character. *Blockburger v. United States* emphasizes this difference. 284 U.S. 299, 302 (1932). (Brief for Petitioner 24-25). *Blockburger* recognized that Congress may specifically punish either the *business* of selling drugs or the individual acts of drug sales. The Court concluded that it was permissible to punish some transactions individually. The Narcotic Act did not proscribe the *business* of continuous drug sales, as Blockburger argued. *Id.*

Where Congress has defined an offense such as the "business" of drug dealing which is continuous in character, the traditional anlysis as set forth in *In re Nielsen*

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offense) but instead may construe them in accordance with the usual rules of interpretation." (Brief for U.S. 15 n.9) *Nielsen* looked at the underlying *facts* which prove or were relied upon to prove the offenses to determine if they were the same for Double Jeopardy purposes. The statutory elements of various offenses, have not and cannot be viewed in a vacuum. See *infra,* at 7-9. *Nielsen* accomplished this "rule of interpretation" by viewing the averments of the *admitted facts* and applying them to the statutes to conclude the 2 statutory offenses were the same. Similarly, when the Court distinguished *Morey v. Commonwealth,* 108 Mass. 433 (1871), it looked to the *facts* and elements of the charged offenses to conclude that the "evidence required to support the two indictments was not the same." *Id.* at 188. The Massachusetts Court concluded that the *facts* and elements did not constitute the "same offense". The indictment for lewd and lascivious cohabitation continued no *averment* and *required no proof* that either of the parties was married, but did require *proof* that they dwelt or lived together, and would not be supported by *proof* of a single secret act of unlawful intercourse. . . . Full *proof* of the offence charged in either indictment would not therefore of itself have warranted any conviction upon the other." 108 Mass. at 435-436. (emphasis added). Petitioner makes no further analysis regarding the *Blockburger* test as it applies to Petitioner's greater-lesser offense analysis.

applies. The logical result of this analysis is that the Government is barred from segmenting up that unlawful business or course of conduct and prosecuting individual portions of that continuing conduct. This is true whether the offense is cohabitation and adultery a day later,[2] cohabitation with more than one woman over three successive years,[3] being a common seller of liquor as opposed to a single sale,[4] labor violations for different employees over six to twenty separate weeks,[5] or the ninth day of a continuing joy ride. See *Brown v. Ohio,* 432 U.S. 161, 169 (1977): "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

At least "as a matter of statutory construction, the allowable unit of prosecution may be a course of conduct rather than the separate segments of such a course."[6] 432 U.S. at 171. (BLACKMUN, J., dissenting).

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[2] *In re Nielsen, supra.*

[3] *In re Snow,* 120 U.S. 274, 281-282 (1887).

[4] The single sale would be merged into the offense of being a "common seller". *State v. Nutt,* 28 Vt. 598, 602-603 (1856).

[5] *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 219 (1952).

[6] The Government claims this case does not involve a "unit of prosecution" issue because a single continuing criminal enterprise was not divided into several sub-enterprises for prosecution and punishment. (Brief for U.S. 12 n.4). Contrary to the Government's claim, the issue *is* a "unit of prosecution" as the continuing course of conduct is being improperly segmented for prosecution and punishment. Petitioner has made no claim that sub-enterprises are being prosecuted separately; rather, the same continuing offense is being improperly successively prosecuted and punished. *United States v. Universal C.I.T. Credit Corp., supra,* 344 U.S. at 221, 224.

Similar to the continuing courses of conduct described above, the CCE offense is a continuing one which continues temporally and spatially at least as long as necessary for the CCE defendant to commit the elements of three predicate drug violations in concert with 5 or more persons as a continuing series of same as an organizer, etc. and obtains substantial income or resources.

### B. The Double Jeopardy Clause Bars Successive Prosecution Of The Greater Offense After Petitioner Was Convicted Of The Necessarily Lesser Included Offense Of Importation Of Marijuana Under The Reasoning Of Jeffers v. United States.

The Government argues that CCE, being a "different stripe," should not be subjected to the traditional greater lesser or compound-predicate offense analysis, because CCE is a separate offense and is "just different" from its predicate felonies. The Government spends considerable effort by citing Congressional history to buttress its contention that CCE is a separate offense (Brief at 20-31, 48-49). The same "separate offense" argument was advanced by the Government in *Jeffers v. United States,* 432 U.S. 137 (1977) (plurality opinion) in its *Jeffers* Brief. (See Brief for United States, Number 75-1805, at 23-28). This basic argument was rejected. 432 U.S. at 147. The plurality further rejected the argument the Government now makes that CCE is entitled to some special non-traditional statutory analysis: "Contrary to the suggestion of the Court of Appeals, *Iannelli* [*v. United States,* 420 U.S. 770 (1975)] created no exception to these general [double] jeopardy principles for *complex statutory* crimes." 432 U.S. at 151. (emphasis added).

Although the *Jeffers* plurality contains several qualifiers that it was not deciding that conspiracy is a lesser included offense of the CCE offense,[7] the plurality notes that four of the concurring and dissenting Members base their opinion "on the premise that it was beyond dispute that §§ 846 and 848 were so related" (as lesser and greater offenses). 432 U.S. at 150 n. 15.

*Jeffers* is replete with language indicating that the greater-lesser included offense analysis is absolutely required for its ultimate holding barring cumulative financial punishments. Similarly, *Jeffers'* finding that Jeffers waived his Double Jeopardy objection by not insisting on a joint trial, points to the conclusion that CCE is the exact type statute which is a greater offense with necessarily included offenses. Any other conclusion would make the *Jeffers* analysis meaningless. Similarly, if Jeffers had been charged in one proceeding with CCE and conspiracy offenses, he would be entitled to a lesser included-offense-instruction. 432 U.S. at 153.

Finally, if the Government's argument were correct, i.e., that CCE is a separate offense with no relationship with other drug felonies, the *Jeffers* conclusion that there was a cumulative-punishment problem would be wrong. Reviewing the purposes for the CCE penalty structure (which the Government now seeks to re-argue), *Jeffers* found that Congress did not intend to allow consecutive penalties for the conspiracy and CCE offenses. 432 U.S. at 155-157. Therefore, the Government's present argument that CCE is a separate offense has already been rejected by the Court.

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[7] "For purposes of this case . . . we assume, *arguendo,* that § 848 does require proof of an agreement among the persons involved in the continuing criminal enterprise. So construed, § 846 is a lesser included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846, as well as proof of several additional elements." 432 U.S. at 149-150.

After *Jeffers*, a number of appellate courts held, with or without Government concession, that CCE and conspiracy and/or substantive offenses are greater-lesser offenses for either prosecution or sentencing purposes.[8]

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[8] *United States v. Middleton,* 673 F.2d 31, 33-34 (1st Cir. 1982) (any drug offense actually relied upon to prove CCE is lesser-included, Government conceded Double Jeopardy on Florida conspiracy but not substantive offense), *United States v. Mourad,* 729 F.2d 195, 202-203 (2d Cir. 1984), *petition for* cert. pending, No. 83-2067 (cumulative punishment for multiple Section 846 and 963 conspiracies and CCE not allowed), *United States v. Gomberg,* 715 F.2d 843, 848-851 (3d Cir. 1983) (cannot cumulatively sentence for conspiracy and substantive predicate offenses of the CCE. See also cases cited therein, 715 F.2d at 850 nn. 3-5).

*United States v. Webster,* 639 F.2d 174, 182 (4th Cir.) *cert. denied, sub. nom. Adams v. United States,* 454 U.S. 857 (1981) and 456 U.S. 935 (1982) (Government stipulated Section 846 is lesser-included offense, conviction stricken), *United States v. Johnson,* 575 F.2d 1347, 1354 (5th Cir. 1978), *cert. denied,* 440 U.S. 907 (1979) (Government conceded 5 year consecutive conspiracy sentence to CCE sentence improper, conviction and sentence vacated as conspiracy lesser-included offense), *United States v. Jefferson,* 714 F.2d 689, 703-706 (7th Cir. 1983) (cumulative predicate substantive sentences barred due to CCE comprehensive sentencing structure, substantive sentences vacated; section 846 is lesser-included offense of CCE, conviction and sentence vacated), *United States v. Samuelson,* 697 F.2d 255, 259-260 (8th Cir. 1983) (conviction and sentence for lesser included conspiracy vacated; substantive offenses actually relied upon to establish CCE may be lesser-included offenses), *United States v. Smith,* 690 F.2d 748, 750 and 694 F.2d 724 (9th Cir. 1982), *cert. denied, sub. nom. Fisherman v. United States,* 460 U.S. 1041 (1983) (Government concedes Section 846 is lesser-included offense, violates Double Jeopardy Clause, conspiracy conviction reversed), *United States v. Graziano,* 710 F.2d 691, 699 (11th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1910 (1984) (846 conspiracy is lesser-included offense, conviction and sentence vacated).

The Court has maintained the position that CCE and conspiracy are greater-lesser offenses. *Sanabria v. United States,* 437 U.S. 54, 76-77 (1978).[9]

CCE and its predicates are also the "same offense" if analysed as compound-predicates where normally the greater need not necessarily include the lesser offense, such as a felony-murder, manslaughter-reckless driving, murder-rape; each lesser offense is necessarily included in the greater by the facts averred and proved.

In *Harris v. Oklahoma,* 433 U.S. 682 (1977) (per curiam) the lesser-included robbery with firearm charge was precluded due to a prior prosecution for the greater felony-murder. Similarly, cumulative punishments at the same trial for rape and killing during the rape were barred by the Double Jeopardy Clause since Congress did not otherwise specifically provide. *Whalen v. United States,* 445 U.S. 684, 689 (1980).

It is a necessary part of the Double Jeopardy analysis to determine, where available, if the facts are the same in the lesser which are necessarily included in the greater offense. There has been comment that facts should not so be viewed. *Whalen,* 455 U.S. at 709 (REHNQUIST,

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[9] "Eight Members of the Court agreed that [Jeffers] subsequent trial for conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 during the same time period was on the 'same offense,' since the § 846 violation was a lesser included offense to the § 848 violation." *Id.*

J., dissenting)[10] and observations that the underlying facts are not relied upon in jeopardy analysis. *Whalen, supra,* at 694 n.8. However, the facts of the offenses invariably have entered into the analysis. *In re Nielsen, supra,* and *Morey v. Commonwealth, supra,* at n.1. Similarly, the facts were necessary in order to understand the offense analysis in *Harris v. Oklahoma, supra,* and alluded to in *Jeffers, supra,* 432 U.S. at 150 n.16. In *Illinois v. Vitale,* 447 U.S. 410 (1980) the Court could not decide if the pending manslaughter prosecution was the greater offense and a failure to slow to avoid an accident was a lesser-included "necessary" to prove manslaughter, and if so, Vitale would have a "substantial claim" of Double Jeopardy. Due to this doubt, the case was remanded to determine which *"reckless act or acts* the State will *rely on to prove* manslaughter." 447 U.S. at 421. (emphasis added). See also cases cited at n.8, *supra,* nn.11-12, *infra,* and *United States v. Lurz* and *United States v. Fry, infra.*

Not to look at the underlying facts would lead to unfair results. The State in *Harris v. Oklahoma* may have intended to prosecute the defendant on a prior armed robbery at the same store — eight hours earlier. The State wishing to prosecute a rape after conviction for a murder committed during commission of a rape would be precluded from doing so if the Court only looked at the statutorily necessary elements where the first rape was factually unrelated to the felony-murder. Hence, where the prosecution relies upon the same facts to prove the same offense and cumulates the punishment for the same acts, such conduct is offensive to the Double Jeopardy Clause. Here, the prosecution improperly did both.

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[10] The *Whalen* dissent notes one compound-predicate statute (18 U.S.C. § 924(c)) specifically allows for consecutive punishments for the compound and predicate offenses. 445 U.S. at 709. By contrast, *Jeffers* held Congress did not so provide for cumulative sentencing for CCE and its predicates. 432 U.S. at 156-158. The Government's attempt to analogize CCE to the RICO statute is wrong (Brief, 21 n.11, 48 n.42) as Congress intended to permit cumulative sentences for substantive and underlying predicate RICO offenses. *United States v. Hawkins,* 658 F.2d 279, 287-288 (5th Cir. 1981).

### C. Because Prior Offenses Used For Later Sentencing Enhancement Are Different Offenses And Because There Is No Way, Congressional Or Otherwise, Of Divining What Constitutes A "Principal CCE Felony," No Recidivist Problem Is Presented Here.

No one — Congress, Court or the Executive — have any method to divine what is a "principal felony"[11] in CCE litigation. It may be the major, or most important, or perhaps most impressive felony predicate offered by the

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[11] Although *United States v. Lurz,* 666 F.2d 69 (4th Cir. 1981) *cert. denied,* 455 U.S. 1005, 457 U.S. 1136, and 459 U.S. 843 (1982), is superficially appealing to the Government (Brief, 24 n.17, 35-36), close analysis proves it unavailing to the Government's position. Ignoring the pleadings but examining the *proof* presented, the court of appeals agreed that the Florida conspiracy to manufacture was *factually* a different offense from the Maryland conspiracy to manufacture, distribute, and possess PCP because of different dates, defendants, and purposes. 666 F.2d at 73-74. Hence, these two conspiracies could *not* be the "same offense" to the CCE count. Although not clear, it appears the Florida conspiracy was introduced in Maryland solely to establish the CCE elements other than "the" felony predicate violation. *Id.* at 76. Ironically, language in *Lurz* may prove the undoing of the Government's argument that the conspiracies are two of the valid predicate acts used to establish the CCE (Brief, 10 n.3, 37-38 n.31, 49 n.43): "One may not first prove a conspiracy to distribute to establish a § 846 violation, and then move on to convict under § 848 as well, by using the very same conspiracy . . . for the felony violation of the federal narcotics laws (item one in the five point scheme)." *Id.* at 76. *Lurz's* conclusion that CCE is a recidivist statute misperceives CCE's function. See text, above.

Government to prove the CCE offense. It cannot be the conspiracy to import or conspiracy to possess with intent to distribute marijuana offense, because all that is necessary there to convict Petitioner is that he join the agreement. No overt act is required. (Brief for Petitioner, 11 n.8). It certainly could not be the relatively innocuous act of making a telephone call to facilitate a felony. (J.A. 63) The importation count is a more likely candidate based upon the impact of the 12,000 pounds of evidence from the Washington importation. However, it is clear that there is no way of determining what felony the jury determined was the most serious or "principal felony" because Congress never provided for such a characterization and the courts have never read such a requirement into the CCE offense. Because of this inability to define or set out a coherent explanation, this portion of the Government's argument must fail. CCE is a criminal statute which is completed, not aggravated, by completion of all its component elements.

Congress has provided for appropriate aggravated punishment of recidivist and habitual offenders of the Drug Act. 21 U.S.C. Sections 841(b) (1) (A), 841(b) (1) (B), 841(b) (2), 841(b) (3), 841(b) (5), 843(c), and 962. Congress also provided for a "dangerous special offender" category whereby a possible maximum 25 years incarceration was set. 21 U.S.C. Section 849. Under such circumstances, Section 848 is not a recidivist or habitual offender statute. This is more so as Section 848 carries its own aggravation for a repeat 848 offender: a mandatory minimum 20 year term without parole or probation. Section 848(a)(2).

Recidivist statutes do not violate Double Jeopardy as they only increase the new punishment, not the prior or pending offense; prior convictions are not necessary to establish the elements of the charged offense. The purpose for recidivist treatment is historical and obvious: the repeat offender, once having *notice* of the unlawful conduct, must bear the increased penalty by again violating the law: "'the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime.'" *Moore v. Missouri,* 159 U.S. 673, 676 (1895).

There is no aggravating nature to any CCE elements. All elements are co-equal. Each of the three predicate crimes are similarly important. No matter if one commits 100 aggravated predicate felonies, the CCE is not complete unless there is a finding beyond a reasonable doubt of organizing, supervising, or managing. No matter if one commits 100 predicate felonies and has the management skills of a modern corporate executive, there is no CCE unless there is also a finding of substantial income or resources.

The Washington offense was introduced as part of the same CCE offense; whereas in recidivist or habitual offender cases the prior offenses are used to aggravate sentences and are for previous unrelated offenses. Here, it was necessary to prove the predicate importation felony to establish all elements of the CCE offense.

### D. Venue Over Petitioner's CCE Drug Activity And Predicate Offenses Would Have Been Proper In Either Washington Or Florida Because Of The Continuing Nature Of The CCE Offense.

The Government complains that Petitioner is seeking an unfair election by the Government of forums in which to prosecute either the CCE, or, all other evidence relating to substantive offenses to the exclusion of the CCE offense. The Government claims that it should not be forced to forgo prosecution on other substantive offenses because to do so would "disable the government from presenting its complete case against the defendant on the CCE charge . . ." (Brief for U.S. 40). This argument underscores Petitioner's argument that the Government heavily relied upon the Washington importation evidence to prove the CCE count. Despite earlier arguing that the Neah Bay, Washington importation was immaterial to prove the CCE count, (Brief for U.S. 5, 10 n.3, 23 n.14) the Government's position on venue is that the Washington importation is indispensable to presenting its "complete case" for proper prosecution and punishment of Petitioner's CCE activity.

Nor is Petitioner seeking to avoid prosecution for other offenses as it will be seen that venue was available in both Washington and Florida and Petitioner sought a joint trial. The Government's fear that without such substantive Washington evidence in Florida Petitioner might obtain an undeserved acquittal or avoid the full responsibility for his crimes (Brief 40-41) caused the Government to prosecute Petitioner twice using the same evidence for the same offense.

Title 18 U.S.C. Section 3237(a) allows an offense to be prosecuted in any district where the offense is begun, continued, or completed.

A review of each count of both Washington and Florida indictments shows that venue would have been proper in either district. The Travel Act, Washington Count II, being a continuing offense, could have been

prosecuted in Florida as it alleged Petitioner caused Knowles to travel from the Northern District of Florida. (J.A. 6). See *United States v. Midstate Horticultural Co.,* 306 U.S. 161, 165-166 (1939), *United States v. Polizzi,* 500 F.2d 856, 898-899 (9th Cir. 1974) (Browning, J., concurring), *cert. denied,* 419 U.S. 1120 (1975). Similarly, venue as to the conspiracy charges such as counts I and II in Florida (J.A. 55-63) is proper in any district where an overt act is committed, *United States v. Barnard,* 490 F.2d 907, 909-910 (9th Cir.), *cert. denied,* 416 U.S. 959 (1974), *United States v. Lewis,* 676 F.2d 508, 511 (11th Cir. 1982). The Florida conspiracies alleged and proved overt acts occurring in Washington.

In order to raise its venue objection, the Government must narrowly read CCE venue requirements while ignoring its earlier arguments that the Court must accommodate the Government's and the public's interest in effective law enforcement. (Brief 20-21). Such a narrow construction is unnecessary.

Questions of venue "touch closely the fair administration of justice and public confidence in it, on which it ultimately rests." *United States v. Johnson,* 323 U.S. 273, 276 (1944). The continuing nature of CCE's ongoing violatinons make venue available to the Government in whatever district a felony drug predicate act is performed. Since Section 848 has no explicit venue provision, the *locus delicti* must be determined from the nature of the crime and the location of the act or acts constituting it. *United States v. Anderson,* 328 U.S. 699, 703 (1946); *Travis v. United States,* 364 U.S. 631, 634-635 (1961); *United States v. Fry,* 413 F.Supp. 1269, 1271 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977).

In *Fry, supra,* the defendant argued, as the Government does in the instant case, that the 848 count involving 36 overt acts of marijuana shipments in Kansas, Colorado, Pennsylvania, New England and Michigan, the place of prosecution, did not confer venue in Michigan because Fry was never involved in the district of Michigan, being only involved in California. 413 F.Supp. at 1271. Fry argued that if his co-defendants' Michigan activities were accessorial to the enterprise, he, as the principal would not be triable in Michigan. The Court rejected such an argument as "unduly narrow." 413 F.Supp. at 1272. Either one of the "continuing series" of criminal acts, the conspiracy to distribute marijuana and the components of the substantive Section 841(a)(1) acts committed by others in Michigan were in reality "undertaken" by Fry in concert with five or more persons and would properly confer venue in Michigan. *Id.* at 1273.

The Government's narrow reading of venue would lead CCE defendants to commit predicate offenses in numerous disparate districts secure in the knowledge that such offenses could not be prosecuted along with the CCE offense, thereby never allowing a CCE offense to be consummated in any one district. Congress and the Courts do not contemplate such illogical results.

As construed above, the Washington importation and distribution counts (II and III, J.A. 6-7) would have been properly tried in Florida.[12] Viewed conversely, the CCE,

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[12] It would be difficult for the Government to argue that Florida would be an inconvenient forum to try the Washington acts as the Government tried the Washington charge in Florida

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anyway when it flew to Petitioner's Florida trial Michael Johnston (on 24 hour's notice) from California, a D.E.A. chemist from Honolulu, two D.A. agents, and one Makah Indian Chief from Washington State. (Brief for Petitioner, 18-21). Cases cited by the Government are inapposite. In *United States v. Chagra,* 653 F.2d 26, 32 (1st Cir. 1981), *rev'g on other grounds,* 494 F.Supp. 908, 911 (D. Mass. 1980), *cert. denied,* 455 U.S. 907 (1982) the defendant was indicted in Texas for 3 drug conspiracies and cocaine possession in 1977 and a CCE between April, 1974 and April, 1978. After conviction in Texas on two counts (cocaine possession and the CCE), he was indicted in Massachusetts on conspiracy to import and distribute marijuana in 1975 and separate counts of importing and possession marijuana in July, 1975. The court pointed out it could not try Chagra in Texas, presumably because those acts were not alleged as part of the CCE offense: "the facts presented in Massachusetts are totally different from those presented in Texas." 653 F.2d at 32. In *United States v. Davis,* 666 F.2d 195, 200 (5th Cir. 1982), venue was improperly found because the defendants did not actually or constructively possess the drugs until they later arrived in Florida. However, in view of the special accessorial role of a CCE defendant who "undertakes" the felony offenses in concert with five or more persons, and has a supervisorial, or managerial role, or organizes and has a financial stake in the drugs, it is clear such defendant qualifies as an aider, abettor, principal, or constructive possessor of the drugs in each district. *Fry,* 413 F.Supp. at 1273. Moreover, Petitioner Garrett was alleged to be in each district and to personally contribute to consummation of each offense.

Finally, Petitioner moves to strike the Government's improper and unsupported by the record factual allegations raised in its Brief at 39 n.33. For authority, see *infra,* at 18. Based upon the record itself, many of these unsupported allegations are disposed of by Government number: First: Petitioner may have grown up in Panama City but the record establishes he lived in and had a civil suit pending in Seattle, a boat in Hawaii, traveled to visit his Georgia attorney, and visited Texas and Louisiana amongst other locations. Robert Hoskins was serving a 17 year jail term and was severed because of illness. (M.T. April 8, 1931, 2-5, Sept. 18, 1981, 55-56, 1 Tr. 5,7). Defendant, Caesar Garcia, had Colombian connections and rented a Louisiana warehouse (1 Tr. 64, 89); another, Norman Vick, co-operated, and Christopher Garrett lived in Tampa (8 Tr. 70) and retained two Miami attorneys, the Joe Knowles tape re-

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the conspiracy to import marijuana and Thai sticks, the conspiracy to possess with intent to distribute marijuana during the time which included the Neah Bay incident, and the telephone counts all would have venue properly set in Washington. (J.A. 55-65).

Substantive offenses such as distribution and importation of marijuana are considered continuing offenses which continue until the narcotics reach their point of destination. A narrow construction of the statutes has been rejected by the courts of appeal. *United States v. Phillips,* 664 F.2d 971, 1031 (5th Cir. 1981), *cert. denied sub nom., Platshorn v. United States,* — U.S. —, 103 S.Ct. 208 (1982), *United States v. Gray,* 626 F.2d 494, 497-498 (5th Cir. 1980), *cert. denied,* 449 U.S. 1091 (1981), and *sub. nom., Wright v. United States,* 449 U.S. 1038 (1980), and *sub. nom., Barker v. United States,* 450 U.S. 919 (1981),

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cordings were in Washington State (M.T. Sept. 18, 1981, at 32-33); Second: if Knowles was the key witness, travel was not foreign to him since he and the federal agents traveled to California and Washington on May 22, and October 25, 1979. (Brief for Petitioner, 18-19) and presumably for the Washington grand jury, and would have been expected to attend trial in Seattle if Petitioner had demanded one; Third: there still would have been two trials. If the Washington indictment went to trial it would require the same evidence developed in Florida: there was no guarantee when Petitioner was indicted in Washington he would plead guilty. Only after he pleaded in Washington was he indicted in Florida; Fourth: There is nothing in the record to conclude that Washington does not have a similar drug problem; indeed 12,000 pounds of marijuana were imported 3500 miles away from Panama City in the State of Washington. In any event, such after the fact rationalizations should be disregarded. It is inherently unfair to expect Petitioner to adequately refute such Executive Branch recollections not supported by the record.

*United States v. Brunty,* 701 F.2d 1375, 1380-1382 (11th Cir.) *cert. denied,* — U.S. —, 104 S.Ct. 155 (1983).[13]

It is the Government itself which has "waived" any right to have all serious felony drug conduct tried in one proceeding.[14] By electing not to charge Petitioner with the CCE offense in Washington, the Government should not be allowed to profit from its own calculated error by improperly twice prosecuting and punishing Petitioner for the same offense. If the Government truly sought to call Petitioner to answer once for his wide-spread drug activities in one full and fair opportunity (Brief for U.S. 41) it did not do so by prosecuting him twice.

Additionally, there is no such exception to Double Jeopardy barring successive prosecutions as "reasonable belief evidence does not warrant prosecution or conviction." (Brief for U.S. 43). The Government cannot argue against forcing prosecutions which would lead to increased multiple trials and then do that exact thing to Petitioner. The trial record below exhaustively establishes that the Government possessed all its necessary evidence before

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[13] Petitioner sought to effectively waive whatever venue problem there might be when he moved to consolidate the CCE charges in one trial in Washington. (J.A. 21-31). Venue objections may be waived by the defendant. *United States v. Stratton,* 649 F.2d 1066, 1076-1079 (5th Cir. 1981). Contrary to the Government, Petitioner sought to have all his criminal liability litigated in one proceeding. It is the defendant's choice to waive possible Double Jeopardy error and he retains primary control over the course to be followed in the event of such error. *United States v. Dinitz,* 424 U.S. 600, 609 (1976).

[14] Contrary to the Government's present position, evidence from other districts has been liberally used in other CCE prosecutions. See nn.8,11.

Petitioner was indicted in Washington. No new witness was developed. The only additional evidence was Petitioner's arrest 7 days after the July 16, 1981 Florida indictment. (Brief for Petitioner, 22 n.23). The newest allegations, the Washington importation, had to have been developed before the March 17, 1981 Washington indictment and positively before the May 18, 1981 Speedy Trial date. (J.A. 1) Knowles was developed as a "key" witness in both Washington and Florida cases in 1979. (J.A. 6, 7, 61-62, 5 Tr. 179-183, 6 Tr. 31-34). No remand is necessary as the facts are set forth in the record.

What is not in the record, however, is the Government's improper gratuitous statements attempting to subvert the record. (Brief for U.S. 39, & n.33, 44, & n.36). Petitioner moves to strike all such statements, and that they not be considered. Cases can only be considered on the record, not on improper unsworn statements. *Adickes v. Kress and Co.,* 398 U.S. 144, 157-158, n.16 (1970), *Hopt v. Utah,* 114 U.S. 488 (1885), *Russell v. Southard,* 53 U.S. (12 How.) 138, 158-159 (1851) ("This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court . . .''). Stern and Gressman, SUPREME COURT PRACTICE, 716 (5th ed. 1978). Despite the attempt to impeach its own Assistant U.S. Attorney (Brief 44 n.36), the record establishes that the CCE was authorized and ready to go forward in Washington State. Successive prosecutions were Constitutionally barred.

## II

## CUMULATIVE SENTENCES ARE BARRED DUE TO JEFFERS' INTERPRETATION OF ALL DRUG STATUTES

The Government reads *Jeffers* too narrowly. Looking at the *entire* drug sentencing structure, *Jeffers* held "Section 848 itself reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from *other sections* of the . . . Drug . . . Act of 1970." 432 U.S. at 156 (emphasis added). Obviously, CCE was not limited to denying cumulative sentences to just abstract conspiracies, as the Government contends (Brief for U.S. 53-54).

Even if CCE's language was ambiguous, the "rule of lenity" would apply so as not to increase the penalty upon the defendant where an interpretation "can be based on no more than a guess as to what Congress intended" *Ladner v. United States,* 358 U.S. 169, 178 (1958), *Whalen,* 445 U.S. at 695 n.10. With its no parole or probation provisions there can be no more feared statute than CCE. It is hard to imagine it is to any defendant's "advantage" to be sentenced under CCE (Brief for U.S. 50). All other drug statutes would allow the defendant to be released in 40-52 months under Parole Commission guidelines for a person in a category six severity offense (marijuana) and very good offender characteristics. 28 C.F.R. § 2.20 at 89, 95 (1984) [*Rules and Procedures Manual,* United States Parole Commission, § 2.20 (1984)]. Although the fine is limited to $100,000.00, anticipating the unforseeability of voluntary collection of a CCE fine from a defendant in prison for the rest of his life, Congress wisely provided for asset forfeiture in two separate statutes. 21 U.S.C. §§ 848(a) (2) and 881.

Ordering a remand for resentencing (Brief for U.S. 46 n.39) is inappropriate due to the Constitutional injury suffered because of multiple prosecutions. *Jeffers*, 432 U.S. at 151 n.18. Petitioner was improperly cumulatively sentenced for the same offense.

## CONCLUSION

The CCE conviction and sentence should be vacated.

Respectfully submitted,

Philip A. DeMassa
*Attorney for Petitioner*
Jonathan Garrett